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# Greater Representation for California Consumers—Fluid Recovery, Consumer Trust Funds, and Representative Actions†

by

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## Introduction

In California, statutes prohibiting business practices that abuse consumers have long been part of the state's laws. However, many law enforcement agencies do not have the resources to prosecute all significant violations of consumer protection statutes. The private bar has not proven to be an effective substitute because individual consumer claims are often too small to justify the attorneys' fees necessary to enforce them and difficult certification and notice requirements in the institution of class action litigation often deter lawyers from filing cases in which the total damage suffered would be large enough to support a substantial fee award.

As long as public law enforcement is inadequately funded to prosecute all consumer abuse crimes, inducing the private bar to bring consumer protection suits is of great importance. It is therefore significant that California Courts of Appeal have recently developed the law of class actions and representative actions along lines that encourage more private practitioners to participate in consumer protection litigation. Two procedures that supplement existing class action statutes have been endorsed by California courts: the "fluid recovery" and "consumer trust fund" procedures. Both procedures strongly promote private enforcement of consumer rights. Of even greater potential importance in the private enforcement of consumer rights is the appellate court development of "representative action" law. Representative actions now provide the means for enlisting a substantial portion of the private bar in consumer protection litigation.

Part I of this Article discusses the early development of the class action device in consumer protection litigation and explores the deficiencies of class action procedural requirements.<sup>1</sup> These deficiencies, in the opinion of the authors, flow from the fact that California courts view the "consent theory" as a basis for the class action device.<sup>2</sup> The "interest theory" is not only the traditional premise for class action recovery,<sup>3</sup> but also supports the "fluid recovery" and "consumer trust fund" concepts as well as representative actions.<sup>4</sup>

The use of the fluid recovery procedure to supplement statutory class actions was fully embraced by the California Supreme Court in *State v. Levi Strauss Co.*, a decision discussed at length in Part I.C.<sup>5</sup> Subsequent appellate opinions indicating the value of the fluid recovery concept for representation of California consumers, as well as the value of the subsidiary consumer trust fund device, are also discussed.<sup>6</sup>

The statutory and case law basis for the development of representative actions as a consumer protection procedure are explored in Part II.<sup>7</sup> This Part also analyzes the appellate decisions of the last decade that made representative actions an attractive alternative to class actions for private attorneys representing consumers.<sup>8</sup> Representative actions contain significant practical advantages over class actions that are outlined in Part III.<sup>9</sup> However, while representative actions can be the preferred alternative to class actions, the authors explain why in certain nonconsumer situations, representative actions are not appropriate.<sup>10</sup>

In Part IV, two recent examples of representative actions are discussed.<sup>11</sup> In the first case, a public law enforcement agency used the representative action device; in the second, private attorneys filed the representative action. The fluid recovery-consumer trust fund concepts were successfully used in both cases. Practical concerns for attorneys who seek fluid recovery and the establishment of consumer trust funds are discussed in the Appendix to this Article.

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1. See *infra* text accompanying notes 12-49.

2. See *infra* text accompanying notes 36.

3. See *infra* text accompanying notes 34-35.

4. See *infra* text accompanying notes 50-75.

5. *State v. Levi Strauss Co.*, 715 P.2d 565 (Cal. 1986). See *infra* text accompanying notes 52-72.

6. See *infra* text accompanying notes 73-75.

7. See *infra* text accompanying notes 76-103.

8. See *infra* text accompanying notes 104-134 and 159-233.

9. See *infra* text accompanying notes 234-250.

10. See *infra* text accompanying notes 135-138.

11. See *infra* text accompanying notes 251-269.

## I. Consumer Protection Litigation and Class Actions

### A. Consumer Class Actions in California

Class actions, usually thought of as a modern procedural innovation, have actually been entertained by American courts for more than one hundred years.<sup>12</sup> California law has long authorized the litigation of appropriate issues in a class action lawsuit. California Code of Civil Procedure section 382, enacted in 1872, provides that "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."<sup>13</sup> This section has frequently been invoked in consumer protection litigation during the last twenty-five years.

The first landmark consumer class action case in California was *Daar v. Yellow Cab Co.*,<sup>14</sup> in which the plaintiff class challenged an alleged Yellow Cab practice of substantially overcharging customers for taxicab fares. The complaint alleged that a class of people who used Yellow Cabs had been overcharged, that the percentage rate of overcharge was identical for each class member, that each had sustained a loss because of the overcharges, and that the amount of the overcharge could be determined from Yellow Cab's books and records. The court held that these allegations established a proper class because of the well-defined community of interest in questions of law and fact.<sup>15</sup> The court was persuaded that, absent a class suit, the defendant would be able to retain the benefits of its wrongful conduct since individual consumer losses were too small to justify individual lawsuits.<sup>16</sup>

In another landmark case, the California Supreme Court specifically recognized the value of class litigation as a deterrent for unlawful conduct. In *Vasquez v. Superior Court*,<sup>17</sup> the court acknowledged the importance to society of protecting consumers from being duped by unscrupulous sellers. The court held that consumers could maintain a class action against a seller of freezers and frozen food and its finance company assignees. The court again noted that large numbers of consumers are frequently exposed to the same dubious practice by the

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12. See Stephen C. Yeazell, *From Group Litigation to Class Action, Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067, 1085-1107 (1980).

13. CAL. CIV. PROC. CODE § 382 (West 1973).

14. 433 P.2d 732 (Cal. 1967).

15. *Id.* at 747.

16. *Id.* at 746.

17. 484 P.2d 964 (Cal. 1971).

same seller and that individual actions are impracticable because individual recoveries would be too small to justify costs of suit.<sup>18</sup>

The California Supreme Court reemphasized the utility of class action procedures in consumer protection litigation in *La Sala v. American Savings & Loan Ass'n*.<sup>19</sup> The court permitted a class action challenging a provision in a lending institution's standard form trust deed. Finding the deed to be adhesive and unenforceable, the court recognized that "controversies involving standardized contracts of adhesion present ideal cases for class adjudication."<sup>20</sup>

A more recent opinion by the California Supreme Court, *Richmond v. Dart Industries, Inc.*,<sup>21</sup> considered a class action brought by a group of subdivision lot purchasers alleging that the developer had fraudulently represented the availability of basic utilities, which it then failed to provide. In reversing the trial court's denial of class certification, the court declared:

"Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." Because of these impor-

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18. *Id.* at 968-69.

19. 489 P.2d 1113 (Cal. 1971).

20. *Id.* at 1121. Other cases in which consumer protection issues have been litigated by a class include: *Kagan v. Gibraltar Sav. & Loan Ass'n*, 676 P.2d 1060 (Cal. 1984) (involving deceptive advertising that customers would not be charged management fees on Individual Retirement Accounts); *Occidental Land v. Superior Court*, 556 P.2d 750 (Cal. 1976) (involving alleged misrepresentations of the amount of maintenance fees in a housing subdivision); *Lazar v. Hertz Corp.*, 191 Cal. Rptr. 849 (Ct. App. 1983) (challenging an automobile rental company's practice of charging excessive prices for gasoline when cars were returned with less than a full tank); *Rosack v. Volvo of Am. Corp.*, 182 Cal. Rptr. 800 (Ct. App. 1982), *cert. denied*, 460 U.S. 1012 (1983) (claiming an unlawful vertical resale price maintenance scheme in the sale of Volvo automobiles); *Hoyga v. Superior Court*, 142 Cal. Rptr. 325 (Ct. App. 1977) (alleging that defendants sold "good" quality beef falsely upgraded to "choice"); *McGhee v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 131 Cal. Rptr. 482 (Ct. App. 1976) (challenging as adhesionary impound account provisions of standardized deeds of trust that did not provide for interest to homeowners); *Cartt v. Superior Court*, 124 Cal. Rptr. 876 (Ct. App. 1975) (alleging false advertising and excessive pricing in the sale of gasoline); *Javor v. State Bd. of Equalization*, 527 P.2d 1153 (Cal. 1974) (seeking to recover state sales taxes on vehicles including excise taxes made refundable by Congress); *Budget Fin. Plan v. Superior Court*, 110 Cal. Rptr. 302 (Ct. App. 1973) (seeking to rescind retail installment sales contracts executed on the basis of false representations of reduced prices); *Anthony v. General Motors Corp.*, 109 Cal. Rptr. 254 (Ct. App. 1973) (seeking to compel motor vehicle manufacturers to replace defective wheels on three-quarter-ton trucks).

21. 629 P.2d 23 (Cal. 1981).

tant dual functions, courts and legislators have looked with increasing favor on the class action device.<sup>22</sup>

The California Legislature addressed the same need by passing the Consumer Legal Remedies Act of 1970, which specifically authorizes class action suits to remedy certain enumerated unfair or deceptive acts in connection with the sale or lease of goods or services to consumers.<sup>23</sup> Section 1781 of the Act provides: "Any consumer entitled to bring an action under § 1780 may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other customers to recover damages or obtain other relief as provided . . . ."<sup>24</sup> The prerequisites to a class suit under this statute are similar to those contained in Federal Rule of Civil Procedure 23, with the significant differences mentioned in the following section.<sup>25</sup>

## B. Problems with Consumer Protection Cases Litigated as Class Actions

While the California Supreme Court has often urged the use of class actions in consumer protection litigation, certain procedural requirements make the device a less efficient and more uncertain instrument for the vindication of consumer rights than representative actions.<sup>26</sup> One such requirement is that the plaintiff named to repre-

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22. *Id.* at 27. The court further explained:

Dramatic developments in class action procedure have marked the last two decades, with the expansive amendments in 1966 to Rule 23 of the Federal Rules of Civil Procedure and with the passage in 1970 of the Consumers Legal Remedies Act in California. As a result of these and other changes, the class action, which began as a child of the equity courts with limited usefulness, has matured and expanded to meet the needs of modern society.

*Id.* (citations omitted).

23. CAL. CIV. CODE § 1750-1784 (West 1985 & Supp. 1994). Section 1780 outlines certain practices prohibited under that statute, including passing off goods or services as those of another, representing that goods or services have characteristics or benefits which they do not have, advertising goods or services without intending to sell them as advertised, and inserting an unconscionable provision in a contract. *Id.* § 1780. The California Supreme Court construed this statute to apply to financial services in *Kagan v. Gilbraltar Sav. & Loan Ass'n*, 676 P.2d 1060, 1066-68 (Cal. 1984). In *Moreno v. ITT Consumer Fin. Corp.*, No. 91-8716 (S.F. Super. Ct. May 21, 1991), a trial court followed *Kagan* and held that the coverage of the Consumer Legal Remedies Act extends to misrepresentations made in connection with consumer loans.

24. CAL. CIV. CODE § 1781 (West 1985).

25. See *infra* text accompanying notes 44-49 (discussing the provisions in California Civil Code § 1781 relating to form of notice to members of the class and the power of the trial court to order the defendant to pay the costs of notice).

26. See *infra* text accompanying notes 89-92. The relative advantages of representative actions over class actions are listed *infra* text accompanying notes 234-251.

sent the class must also be a member of the class.<sup>27</sup> For this reason, a consumer who knows of an abusive practice, but who has not been victimized, cannot be a class representative. Similarly, federal decisions hold that an attorney representing a class cannot also be a named plaintiff because the attorney's interest in a fee from the litigation is different from that of members of the class.<sup>28</sup> California courts, on the other hand, take the view that if an attorney is a valid member of the class, the fact that the attorney is appearing for the class and will obtain a fee in the case does not disqualify the attorney from being a class representative.<sup>29</sup>

Of much greater consequence is the disadvantage caused by the fact that California class action law requires time-consuming pretrial procedures that may be extremely costly in consumer protection suits. A trial court must certify all class actions before the actions can proceed,<sup>30</sup> and the certification process can require extensive discovery and lengthy court examination.<sup>31</sup> The process can entail a long waiting period after the filing of the complaint, a large expenditure of the class attorneys' time, and considerable discovery expenses.<sup>32</sup>

The premerit determination class certification procedure required in Rule 23(b)(3) class actions seeking damages reflects the "consent theory"—the more modern theoretical justification for the class action mode of group litigation.<sup>33</sup> However, the traditional theoretical sup-

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27. *Chern v. Bank of America*, 544 P.2d 1310 (Cal. 1976).

28. *Bachman v. Pertshuck*, 437 F. Supp. 973, 976-78 (D.D.C. 1977). See also *Lyon v. Arizona*, 80 F.R.D. 669 (D. Ariz. 1978) (holding class treatment inappropriate when named plaintiff was class counsel's wife and an employee of the defendant).

29. See, e.g., *Daar v. Yellow Cab Co.*, 433 P.2d 732 (Cal. 1967); *Saxer v. Phillip Morris*, 126 Cal. Rptr. 327 (Ct. App. 1975).

30. California Civil Code § 1781(c) provides for a certification hearing, as follows: "If notice of the time and place of the hearing is served upon the other parties at least 10 days prior thereto, the court shall hold a hearing . . . to determine if any of the following apply to the action . . . (1) A class action pursuant to subdivision (b) is proper." CAL. CIV. CODE § 1781(c) (West 1985 & Supp. 1994). Although California Code of Civil Procedure § 382 does not specifically provide a certification procedure, California courts have followed the procedure set forth in Federal Rule of Civil Procedure 23. See, e.g., *City of San Jose v. Superior Court*, 525 P.2d 701, 705 (Cal. 1974); *Vasquez v. Superior Court*, 484 P.2d 964, 977 (Cal. 1971).

31. See generally 7A CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* §§ 1785-1788 (1972) (superseded).

32. See 2 HERBERT B. NEWBERG, *CLASS ACTIONS* §§ 5.05, 7.02 (2d ed. 1985); *Manual for the Conduct of Pretrial Proceedings in Class Actions*, Super. Ct. R., City and County of San Francisco, Rules 421 *et seq.*

33. The text of this paragraph and the next draws heavily on the ideas and research of Professor Stephen C. Yeazell in *From Group Litigation to Class Action, Part I: The Industrialization of Group Litigation*, 27 UCLA L. REV. 514, 522-23 (1980) and *From Group*



port for class action procedures is the "interest theory," under which an active litigant is considered a valid representative for passive persons in a lawsuit if the active litigant has the same or a virtually identical legal interest in the lawsuit as the passive persons. The interest theory was endorsed by English courts in the nineteenth century and supports the relatively simple procedures required for class actions maintained under Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2).<sup>34</sup> If monetary recovery is sought for individual members of the class, however, the interest theory is not considered an adequate basis for recovery under modern class action law. As discussed below, the interest theory is the sole basis for the maintenance of California representative actions regardless of the nature of the recovery sought in a particular representative action—an aspect of representative action law that offers great advantages to attorneys who represent injured consumers.<sup>35</sup>

Under the modern consent theory, inactive (or passive) persons may be represented by an active litigant if the passive persons give their consent to the representation. This theory requires the "consent-gathering" class certification procedure mandated by Rule 23(b)(3).<sup>36</sup> While the actual consent obtained is likely to be attenuated and perhaps the product of confusion or inattention, it is deemed necessary under the Federal Rules of Civil Procedure and analogous state procedures when damages are the primary relief sought by the class representative.

The United States Supreme Court has held that a judgment in a class action seeking money damages cannot bind absent parties under

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*Litigation to Class Action, Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067, 1068-69, 1108-21 (1980).

34. Under these rules, a class action seeking injunctive relief and ancillary damages may be maintained if the prosecution of separate actions by individual class members would create the risk of inconsistent adjudications establishing incompatible standards of conduct for the party opposing the class, if the adjudication of a single case would in effect be dispositive of the interests of others not parties to that case, or if the party opposing the class has acted or refused to act on grounds generally applicable to the class. *See* FED. R. CIV. P. 23(b).

35. *See infra* text accompanying notes 86-88. In Federal Rule of Civil Procedure 23(b)(2) class actions seeking primarily injunctive relief, as in representative actions under California's Unfair Trade Practices Act, no notice to the class or opportunity to opt out are required. CAL. BUS. & PROF. CODE §§ 17200-17209 (West 1987 & Supp. 1995).

36. The "consent" obtained by the certification procedures of Federal Rule of Civil Procedure 23(b)(3) is really an "absence of protest." Consent is presumed unless a potential class member opts out by responding to a notice of the formation of the class, or of a settlement, and informing the court that he or she does not wish to be a member of the class. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 16.5, at 744-47 (1985).

constitutional due process principles unless the class members "receive notice plus an opportunity to be heard and participate in the litigation . . . ." <sup>37</sup> If the judgment is to be binding on absent parties, the notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." <sup>38</sup> In addition to this constitutional requirement, which relates to the res judicata effect of a judgment, the express provisions of Federal Rule of Civil Procedure 23(b)(3) have been held to require individual notice to all class members identifiable through reasonable effort. <sup>39</sup>

For class actions commenced in California state courts, one well-reasoned and oft-cited appellate decision indicates that the state constitution does not require such individual notice. <sup>40</sup> The decision holds that "meaningful" notice by publication may be sufficient to satisfy the due process requirement of the state constitution if it has a reasonable chance of reaching a substantial percentage of the class members. <sup>41</sup> However, California courts must comply with codified class action notice requirements. Individual notice, therefore, may be ordered by a California court under either California Code of Civil Procedure section 382 or Civil Code section 1781(d). Additionally, "[i]t is well established that in the absence of relevant state precedents trial courts are urged to follow the procedures prescribed in Rule 23 of the Federal Rules of Civil Procedure for conducting class action." <sup>42</sup> This

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37. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). The specific issue concerned the power of a state court to exercise jurisdiction to reach a class judgment that would bind nonresident class members. The court clarified the due process requirement in order to bind known absent class members to a judgment in a class action predominantly seeking a money judgment. See 1 HERBERT B. NEWBERG, *CLASS ACTIONS* § 1.13 n.141 (Supp. 1990).

38. *Shutts*, 472 U.S. at 812 (quoting *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950)).

39. *Eisen v. Carlisle & Jacquelin* (*Eisen IV*), 417 U.S. 156, 173 (1974). The case left open the question of whether such individual notice was constitutionally mandated in order to be binding on absent class members. See Zachary A. Smith, *Class Actions: State Notification Requirements After Eisen*, 8 W. ST. L. REV. 1 (1980). California law is clear that a class action may be permitted to go forward even if the defendant is not assured that all members of the class will be bound by the judgment. *Cartt v. Superior Court*, 124 Cal. Rptr. 376, 380 (Ct. App. 1975).

40. *Cartt*, 124 Cal. Rptr. at 386.

41. *Id.*

42. *Frazier v. City of Richmond*, 288 Cal. Rptr. 376, 381 (Ct. App. 1986) (citing *Green v. Obledo*, 624 P.2d 256, 267 (Cal. 1981), *cert. denied sub nom.*, *McMahon v. Green*, 474 U.S. 819 (1985)).

instruction means that the individual notice required by Rule 23(b)(3) also may be required by California trial courts.

The cost of individual notice lessens the usefulness of class actions in enforcing consumer protection laws. If borne by the class, the expense of such notice can be prohibitive in any large consumer class action. The possibility of such expense is a considerable deterrent to filing class actions on behalf of California consumers.<sup>43</sup>

However, California Civil Code section 1781(d) provides that the cost of notice may be shifted to the defendant, and, in *Civil Service Employees Insurance Co. v. Superior Court*,<sup>44</sup> the California Supreme Court indicated that a trial court may shift such costs. The opinion reviewed a class action challenging an insurance company's alleged refusal to pay benefits owed to claimants.<sup>45</sup> The California Supreme Court upheld a pretrial order requiring defendants to initially pay the costs of notifying the plaintiff class. Although section 1781 did not directly apply to the case, the court stated that procedures from the California Consumer Legal Remedies Act were appropriate and could be used.<sup>46</sup> The court held that the 1781(d) cost-shifting provision did not violate the defendant's due process rights.<sup>47</sup>

*Civil Service* offers hope to parties who want to bring consumer class actions, but cannot finance class notification.<sup>48</sup> This opinion, which is in line with the general concepts in the court's 1971 *Vasquez*

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43. For example in *Cartt*, the cost of mailing notice as ordered by the trial court was about \$68,718. *Cartt*, 124 Cal. Rptr. at 379. The appellate court stated that this order effectively ended the litigation because the expense was beyond plaintiff's means. The court further stated that to follow the legislative and judicial policies favoring class actions to challenge unscrupulous business practices, such a result should be avoided. *Id.* at 381-82. See also Lewin, *Class Action Suits Are Risky But Pay Off for Some Lawyers*, 96 L.A. DAILY J., Dec. 26, 1983, at 16.

44. 584 P.2d 497 (Cal. 1978).

45. *Id.* at 505. See also *Vasquez v. Superior Court*, 484 P.2d 964, 974-77 (Cal. 1971) (allowing the Act's procedures to be used in litigation filed prior to the effective date of the Act).

46. Section 1781(d) specifies that "the court may direct either party to notify each member of the class." CAL. CIV. CODE § 1781(d) (West 1985). The provisions of § 1782 further require that, before filing suit, a consumer seeking to enforce rights under the California Consumer Legal Remedies Act (CLRA) must request appropriate relief from the seller of the good or service that caused the abuse. *Id.* § 1782(c). The request may be made on an individual or class basis. If the seller complies with the request, thereby making the consumer or class of consumers whole, no action for damages under CLRA may be maintained. To preclude a suit for damages, the potential defendant must stop the practice, identify and notify all affected persons, and provide the appropriate remedy to all of them.

47. *Civil Serv. Employees Ins.*, 584 P.2d at 506.

48. *Id.* at 504-08.

decision, gives a trial court discretion to make an order shifting notification costs to the defendant. Restrictive federal court rulings on similar issues are therefore unpersuasive to California courts interpreting this state statute.<sup>49</sup>

The delay and expense of the pretrial certification hearing as required under California class action procedures will continue to be a matter of concern to attorneys contemplating bringing a class action on behalf of consumers. While California notice and cost requirements may be less onerous than the federal counterparts, the decision on these points rests within the discretion of the trial court. Posttrial class action procedures, while never as problematic as the foregoing, are complex enough to require discussion. In this area, California precedents are made-to-order for consumer protection litigation.

### C. Fluid Recovery in Consumer Class Actions

Distribution of the judgment in a consumer class action has usually been a protracted and expensive process because identifying, locating, and communicating with affected consumers is difficult. While a total award—representing the entire amount of all damages suffered by all consumers affected by an illegal practice or the sum of all available statutory penalties—is often possible to determine, members of the consumer class may fail to claim and receive their portion of this total damage award.

Such “unclaimed funds” or “residue” situations occur when class members are not identifiable or cannot be located through the use of defendant’s records.<sup>50</sup> Residues also arise when contacted consumers neglect to come forward to claim their portion of the total award.<sup>51</sup> The eventual disposition of such unclaimed funds has concerned Cali-

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49. In interpreting Federal Rule of Civil Procedure 23, the United States Supreme Court has refused to allow a “mini-hearing” on the merits to determine whether plaintiffs must pay for the full cost of precertification notice to the class. *Eisen v. Carlisle & Jacqueline* (Eisen IV), 417 U.S. 156, 177-78 (1974). On the other hand, under *Civil Service* such a mini-hearing would be permissible under California law. *Civil Serv. Employees Ins.*, 548 P.2d at 505; see *supra* text accompanying note 44; see also *Cartt v. Superior Court*, 124 Cal. Rptr. 376, 387 (Ct. App. 1975).

50. Defendant’s records may be used to identify and contact members of a class of consumers. See, e.g., *State v. Levi Strauss & Co.*, 715 P.2d 564, 578 (Cal. 1986) (concurring opinion).

51. The procedural basis for the unclaimed fund situation was expressly described by the court in *Vasquez v. Superior Court*, 484 P.2d 796, 964 (Cal. 1971). The court stated that it was not necessary to establish the individual damages suffered by each class member in order to maintain a class action as long as there was a community of interest among class members. Following a judgment for the class, individual claims would have to be proved by class members to obtain a personal recovery from the total award. *Id.* at 969.

for California courts since *Market Street Railway Co. v. Railroad Commission*.<sup>52</sup> The plaintiff, who sued to oppose a commission rate setting order, was found to have collected fares in excess of approved rates. The court ordered refunds to identified passengers and further ordered that unclaimed funds be used for improvements in the railway system, which would benefit all passengers. Thus, recognizing the essential point that funds should not be retained by an entity that obtained them through illegal acts, courts have sought to apply unclaimed funds to a use that will benefit those victimized by unscrupulous practices.

Following the general principle that wrongdoers should not retain their ill-gotten gains, the California Supreme Court in *State v. Levi Strauss & Co.* ruled that individual proof of injury was not necessary for recovery.<sup>53</sup> The court deemed the fluid recovery procedure to be a proper method to distribute the residue of unclaimed funds awarded by settlement or judgment to a consumer class.

Under the fluid recovery procedure, the portion of the fund that cannot be directly distributed to individual class members should be awarded in a manner that will put the residue to its "next best" use and produce benefits for as many class members as possible.<sup>54</sup> The procedure insures that the defendant will disgorge wrongfully gained profits. Proposed specific fluid recovery procedures include price rollback, general escheat, earmarked escheat, and the establishment of an equitable trust fund.<sup>55</sup>

Under the price rollback concept, an amount equal to the unclaimed funds portion of the award is "distributed" by ordering a reduction of the price of defendant's product for a period of time in the future. This is an effective remedy in terms of benefitting the class

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52. 171 P.2d 875 (Cal. 1946).

53. *Levi Strauss*, 715 P.2d at 571. In discussing fluid recovery, the courts in *Levi Strauss* and in *Bruno v. Superior Court*, 179 Cal. Rptr. 342, 343 (Ct. App. 1980), have used the terms "fluid recovery" or "fluid class recovery" interchangeably with the term *cy pres*. The *cy pres* doctrine is a concept borrowed from the law of charitable trusts. *Cy pres* literally means "as near as (possible)"; the doctrine holds that if a particular interest cannot go to an intended trust, it will be put to its next best use. BLACK'S LAW DICTIONARY 387 (6th ed. 1990).

54. *Levi Strauss*, 715 P.2d at 571. See also Natalie A. DeJourlais, Note, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 HASTINGS L.J. 729, 730 (1987).

55. *Levi Strauss*, 715 P.2d at 571-73. See also DeJourlais, *supra* note 54; Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 SANTA CLARA L. REV. 747 (1988); Kerry Evan Barnett, Note, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 YALE L.J. 1591 (1987).

only if affected consumers will continue to buy the defendant's product or services.<sup>56</sup>

General escheat requires a deposit of the residue into the state government's general fund. Escheat is an automatic unclaimed funds mechanism under statutes such as California Civil Code section 1519.5, which provides that any unclaimed monies held by a firm under a court order to make refunds to claimants escheats to the state after one year.<sup>57</sup> While this method forces the defendant to disgorge wrongfully-gained profits, benefits are thinly spread throughout the general public and there is no focus on future deterrence of the offense. Both of these characteristics of general escheat argue against its use under the fluid recovery concept.<sup>58</sup>

Earmarked escheat directs awarded funds to specific government agencies that are in a position to use the funds for lawsuits, lobbying, or other projects that may benefit class members in the future. Although preferable to general escheat, earmarked escheat has a potential drawback in that the agency may use the funds for agency purposes that do not benefit class members. Furthermore, the escheat of funds to the government agency may be viewed as a windfall by the legislature or executive resulting in reduced appropriations to the agency, thereby minimizing the benefit of the escheated funds. To safeguard against this reduction, the parties may stipulate to a provision in the court order that makes payment of the escheated funds to a governmental agency contingent upon a showing that other allocations to that agency have not been reduced.<sup>59</sup>

The establishment of a trust fund through the trial court's equitable powers is frequently the most effective "next best" use of unclaimed funds.<sup>60</sup> This remedy resembles earmarked escheat, except that the money, instead of going to a specified government agency,

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56. *Levi Strauss*, 715 P.2d at 571.

57. CAL. CIV. CODE § 1519.5 (West 1987 & Supp. 1991).

58. Counsel for consumers may eliminate the need to debate whether or not escheat is appropriate by simply obtaining control over the distribution of the settlement fund, including any undistributed residue, by settlement or court order.

59. *Levi Strauss*, 715 P.2d at 572 n.10.

60. California Civil Code § 1519.5, which provides for escheat, does not preclude courts from making equitable awards of unclaimed funds as an alternative to escheat. The section, in fact, specifically authorizes courts to make such awards, providing: "Further, it is the intent of the Legislature that nothing in the section shall be construed to change the authority of a court or administrative agency to order equitable remedies." CAL. CIV. CODE § 1519.5 (West 1987 & Supp. 1991). Thus, the section does not preclude the establishment of an equitable trust fund by court order if such a fund is an effective "next best" use of the unclaimed funds.

goes to a private nonprofit organization entrusted to use the money to benefit the class. Using a private trust avoids the problems associated with general and earmarked escheat and may also make it possible to award the unclaimed funds to a more appropriate body.

The use of fluid recovery to distribute unclaimed funds in California class actions was first discussed in *Bruno v. Superior Court*.<sup>61</sup> Plaintiffs, in an antitrust action, alleged price fixing by supermarkets selling milk and sought a total damage award for a class of milk-buying consumers.<sup>62</sup> The plaintiffs requested that any unclaimed funds be disposed of under one of three alternative means: a court order requiring defendants either to (1) lower future milk prices, (2) to deposit the unclaimed funds with the state of California for charitable purposes benefiting consumers, or (3) to deposit the funds with a state agency for the same purposes.<sup>63</sup> The court of appeal held that each of the three remedies was proper in large class actions involving small individual claims and that each was consistent with the purposes of the antitrust laws, *i.e.*, to prevent and punish anticompetitive acts.<sup>64</sup>

While *Bruno* showed that fluid recovery in class actions was accepted by California appellate courts, the California Supreme Court first specifically approved the fluid recovery concept in the *Levi Strauss* decision. *Levi Strauss* was a class action, claiming violation of California state antitrust law. The Attorney General, who sued on behalf of the State of California and affected consumers, sought monetary relief for millions of California consumers who had allegedly been overcharged for jeans in the early 1970s.<sup>65</sup>

The Attorney General reached a settlement with Levi Strauss, under which the manufacturer would pay \$12.5 million upon certification of the plaintiff class of seven million California households. The class was certified and the Attorney General undertook to distribute the settlement fund on a pro rata basis to consumers who filed claims stating the number of jeans purchased.<sup>66</sup>

Meanwhile, parties representing various other persons and groups intervened and argued that a consumer trust fund should be established with the settlement money. They proposed that the fund be administered by a newly created nonprofit corporation, which

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61. 179 Cal. Rptr. 342 (Ct. App. 1981).

62. *Id.* at 342.

63. *Id.* at 343.

64. *Id.* at 345.

65. *Levi Strauss*, 715 P.2d at 566.

66. *Id.* at 567. Consumers who had bought Levi jeans were entitled to refunds of up to \$3 per pair.

would disburse the fund for consumer protection research, litigation, and other projects.<sup>67</sup>

The trial court approved the Attorney General's settlement proposal and the intervenors appealed. At oral argument in the California Supreme Court, the intervenors agreed that the claims that had already been filed and processed should be honored, but argued that the unclaimed portion of the settlement award should be used to establish a consumer trust fund.<sup>68</sup>

The California Supreme Court, noting the compelling practical considerations, affirmed the trial court's approval of the settlement, but remanded the case. The court also strongly endorsed the consumer trust fund plan as an acceptable alternative disposition of an unclaimed fund residue. The court commented that its decision would "serve as a source of guidance for both the trial court on remand and for other courts in confronting the largely uncharted area of fluid recovery in consumer class actions."<sup>69</sup>

The court noted that a consumer trust fund funded by the unclaimed residue would extend the benefits of the recovery to both silent class members and those who made a claim. Through projects under the trust fund, the aims of the substantive antitrust law would be effectuated,<sup>70</sup> and the disgorgement would deter the defendant from future wrongful conduct.<sup>71</sup> The interests of the entire class, albeit large and ill-defined, would be addressed and protected.<sup>72</sup>

Subsequent opinions of other appellate courts clarify aspects of the *Levi Strauss* holding. First, fluid recovery requires proof that an ascertainable total amount of damages has been suffered by members of the class.<sup>73</sup> While the fluid recovery procedure is a valid method of addressing the potential problem of an unclaimed portion of the total award, the procedure will not cure deficient proof of either the fact of damage to members of the class or the total amount of such damages. Nor will the theory cure deficient proof that the defendant possesses funds that should be disgorged. Second, the appeal of the argument that a defendant should disgorge ill-gotten gains may be less compel-

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67. *Id.* It was further suggested that a nonprofit corporation would maintain the fund in future class action settlements. *Id.* Thus, the proposed fund was directly analogous to that approved by the trial court in *Vasquez v. Superior Court*, 484 P.2d 964 (Cal. 1971).

68. *Levi Strauss*, 715 P.2d at 570.

69. *Id.* at 576.

70. *Id.*

71. See *Barnett*, *supra* note 55, at 1615; *DeJurlais*, *supra* note 54, at 767.

72. *Levi Strauss*, 715 P.2d at 575-76.

73. *Collins v. Safeway Stores, Inc.*, 231 Cal. Rptr. 638, 646 (Ct. App. 1986).



ling in situations in which the defendant's fault is accidental, not culpable, and was promptly corrected.<sup>74</sup> Finally, plaintiff should show either that those class members who fail to make a claim for damages will benefit from the trust fund award to the organization(s), or that the organization receiving the award has the ability and competence to work for the interests the litigation was undertaken to protect.<sup>75</sup>

## **II. Consumer Protection Litigation and Representative Actions**

### **A. Statutory Basis and General Principles**

Although the potential for representative actions in consumer protection litigation is little-known by the general bar, the basic concept has been included in the California codes for decades. Moreover, there is a substantial body of cases interpreting the relevant code provisions. Some knowledge of the statutory and case law development prior to the last decade shows the significance of recent appellate decisions that enhance the potential of representative actions in private consumer protection litigation.

Since 1977, representative actions have been brought under the provisions of California Business and Professions Code (B&P) sections 17200 through 17208 to obtain injunctions and other equitable relief against "acts of unfair competition."<sup>76</sup> "Unfair competition" is defined in section 17200 as "unlawful, unfair or fraudulent" acts or practices, as well as any trade practices prohibited by the sections of the B&P dealing with false advertising.<sup>77</sup> Prior to 1977, the prohibi-

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74. *Id.* at 646 (noting that the defendant undertook a full and voluntary recall and instituted "costly measures to avoid recurrence").

75. *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990) (applying state law). Note that the requirements in this case are generally stricter than California law.

76. The abbreviation B&P will be used in the text to refer to the California Business & Professions Code. Unless otherwise stated, all statutory references are to the Business & Professions Code.

77. See CAL. BUS. & PROF. CODE §§ 17500-17581. The full language of §§ 17200 and 17203 is as follows:

§ 17200. As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with 17500) of Part 3 of Division 7 of the Business and Professions Code.

§ 17203. Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be nec-

tions and most of the procedural provisions now contained in the B&P were found in California Civil Code section 3369. Opinions interpreting that section are therefore directly applicable to the present B&P code sections.<sup>78</sup> The prohibitions contained in B&P section 17200, while extremely broad, are neither vague nor constitutionally defective.<sup>79</sup>

It is established that California courts should give a broad interpretation to each of the three prohibitions in the phrase "unlawful, unfair, or fraudulent."<sup>80</sup> The broad interpretation of "unlawful" allows for recovery when the defendant has violated a statute that would not normally confer standing or provide recovery to the plaintiff.<sup>81</sup> Regardless of the generally expansive reading of the "unlawful" provision, the prohibition cannot be used when there is a bar to recovery under the underlying statute or preemption of section 17200 by a federal statute.<sup>82</sup>

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essary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

CAL. BUS. & PROF. CODE § 17200, 17203 (West 1987 & Supp. 1994).

78. The transfer and division of California Civil Code § 3369 to the B&P Code was considered a mere recodification by the legislature. *See Industrial Indem. Co. v. Superior Court*, 257 Cal. Rptr. 655, 657 (Ct. App. 1989); *People v. Casa Blanca Convalescent Homes, Inc.*, 206 Cal. Rptr. 164, 174 (Ct. App. 1984).

79. *See, e.g., People ex rel. Mosk v. National Research Co.*, 20 Cal. Rptr. 516, 521 (Ct. App. 1962). *See also People v. Witzerman*, 105 Cal. Rptr. 284, 290-91 (Ct. App. 1972) (holding that B&P §§ 17500-17581 are not unconstitutionally vague); *People v. Morse*, 25 Cal. Rptr. 2d 816 (Ct. App. 1993) (holding that B&P §§ 17500-17581 do not violate the First Amendment protections on commercial speech because deceptive or misleading speech is not protected; holding further that § 17537.6 is not unconstitutionally vague as applied to attorneys because the legislative history served to put attorneys on notice).

80. Opinions recognizing that these three prohibitions are disjunctive include: *Bondanza v. Peninsula Hosp. & Medical Ctr.*, 590 P.2d 22 (Cal. 1979) (*see infra* text accompanying notes 142-146); *Samura v. Kaiser Found. Health Plan, Inc.*, 22 Cal. Rptr. 2d 20 (Ct. App. 1993) (finding health plan contract neither unfair nor fraudulent), *cert. denied*, 62 U.S.L.W. 3574 (U.S., May 16, 1994); *People v. Casa Blanca Convalescent Homes, Inc.*, 206 Cal. Rptr. 164 (Ct. App. 1984) (*see infra* text accompanying notes 147-150). The broad interpretive power of courts has been frequently recognized, the most prominent case being *Barquis v. Merchants Collection Ass'n*, 496 P.2d 817 (Cal. 1972) (*see infra* text accompanying notes 105-111). *But cf. Khoury v. Maly's of California, Inc.*, 17 Cal. Rptr. 2d 708 (Ct. App. 1993) (holding that § 17200 actions must be pleaded with particularity). The *Khoury* court neither explained this term nor cited authority. The holding conflicts with the concept of representative actions in all other reported opinions.

81. In essence, the statute "'borrows' violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently actionable under § 17200." *Farmers Ins. Exch. v. Superior Court*, 826 P.2d 730, 734 (Cal. 1992).

82. A plaintiff cannot "plead around" a complete bar to recovery. *Rubin v. Green*, 847 P.2d 1044, 1051-54 (Cal. 1993). *See infra* text accompanying notes 135-138. For preemption, *see Shearson Lehman Bros. v. Greenberg, Nos. CV-93-0609-R & 93-0623-R*, 1993

For convenience and consistency with usage under similar federal statutes, the phrase "unfair practice" will be used in this text to include any act prohibited by B&P section 17200. Because an unfair practice under section 17200 includes anything prohibited by B&P sections 17500-17581, the definition of unfair practice in B&P section 17200 overlaps with the prohibition of false and misleading advertising in B&P section 17500.<sup>83</sup> Thus, cases interpreting the prohibition in B&P section 17500 are applicable to section 17200.<sup>84</sup>

Actions to enforce B&P section 17200 through injunctions and other appropriate remedies are authorized by B&P section 17203, and section 17204 gives standing to the Attorney General, county district attorneys, and a number of other law enforcement personnel to bring such actions.<sup>85</sup> The latter section is expressly based upon the interest theory of group representation, authorizing "any person acting for the interests of itself, its members or the general public" to bring an action under section 17203.<sup>86</sup> The references in the quoted phrase to "interests of itself" and "its members" appear to be redundant, since B&P section 17201 defines the word "person" to include any type of organization of persons. In any event, the quoted phrase from B&P section 17204 has been interpreted by the California Supreme Court to authorize standing for any person or organization to sue to enjoin an

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WL 144856 (C.D. Cal. Mar. 15, 1993) (holding that § 17200 is preempted by federal securities laws). *See also* Mangini v. R.J. Reynolds Tobacco Co., 21 Cal. Rptr. 2d 232 (Ct. App. 1993), *aff'd*, 875 P.2d 73 (Cal. 1994).

83. This is expressly stated in § 17200. *See supra* note 77.

84. The prohibition of false and deceptive advertising is enforceable by representative actions authorized by B&P § 17535. Opinions interpreting § 17535 are considered precedent interpreting B&P § 17203. It generally makes no difference whether a case was brought under the old Civil Code § 3369 or under B&P § 17500 for the applicability of the opinion as precedent under B&P § 17200.

85. B&P § 17204 provides:

Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney . . . or any city attorney of a city having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor or . . . in any city or county having a full-time city prosecutor in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

CAL. BUS. & PROF. CODE § 17204 (West 1987 & Supp. 1994).

86. *See* discussion of group representation theories *supra* text accompanying notes 33-36 and the language of B&P § 17204 *supra* note 85.

unfair practice, regardless of whether the person or organization has suffered injury as a result of the practice.<sup>87</sup>

The same type of analysis has been applied to the power of the courts to order restitution under section 17203, which authorizes such orders when the defendant holds monies or property that "may have been" acquired illegally. Courts accordingly dispense with any required proof of causation of harm to individuals, and the plaintiff need only show that the practice is "likely to deceive" in order to obtain an order restoring monies or property to each and every consumer who was subject to the practice.<sup>88</sup> As an example, in *Fletcher v. Security Pacific National Bank*, some of the class members were aware that the bank's "per annum" interest charge was based on a 360-day year.<sup>89</sup> The court held that a class action on a breach of contract theory could not be maintained because individual proof of lack of knowledge of the method was required to establish each class member's claim.<sup>90</sup> However, the court did allow an action to proceed under B&P section 17535 because the statute "allows restitution without requiring . . . [a] showing of [the] individual's lack of knowledge of the fraudulent practice . . . ."<sup>91</sup> On the basis of *Fletcher*, all that is necessary to obtain restitution in a section 17200 action is that unfair business practices be "likely to deceive."<sup>92</sup> Thus, the scope of the relief available in a section 17200 action is at least as broad, and in some cases even more expansive, than could be achieved in a class action.

*Fletcher* was followed by the California Supreme Court in a case in which the defendant violated the usury laws by not adequately disclosing that compounding would be used to calculate the interest charges on debit account balances at a brokerage firm.<sup>93</sup> The court stated that "knowledge of individual class members regarding the meaning of the terms used in a lending agreement is not necessary for the prosecution of a class action for violation of a statute designed to prevent unfair trade practices."<sup>94</sup>

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87. See discussion of *Barquis v. Merchants Collection Ass'n*, 496 P.2d 817 (Cal. 1972), *infra* text accompanying notes 105-111; *Hernandez v. Atlantic Fin. Co.*, 164 Cal. Rptr. 279, 284 (Ct. App. 1980), *infra* text accompanying note 124; *Consumers' Union of United States, Inc. v. Fisher Dev., Inc.*, 257 Cal. Rptr. 151, 157, (Ct. App. 1989).

88. *Fletcher v. Security Pac. Nat'l Bank*, 591 P.2d 51, 57 (Cal. 1979).

89. *Id.* at 55.

90. *Id.*

91. *Id.* at 57.

92. *Id.*

93. *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 662 P.2d 916, 917 (Cal. 1983).

94. *Id.* at 920.

Similarly, when a car rental company misrepresented (1) the effect of purchasing a "collision damage waiver" and (2) the fact that an overcharge on repairs of damaged cars was billed to consumers, the court of appeal explained:

In order to recover under [section 17500], it is necessary to show only that members of the public are likely to be deceived. Actual deception or confusion is not required. The court may order relief without individualized proof of deception, reliance, and injury if it determines that such a remedy is necessary to prevent use or employment of the unfair practices.<sup>95</sup>

However, federal courts have held that the greatly relaxed standing and recovery requirements authorized by California courts are not available to a private representative plaintiff in a section 17200 action brought in a United States District Court under diversity jurisdiction.<sup>96</sup> In federal court, a plaintiff must meet the standing requirements contained in Article III of the Constitution. These require a showing that the plaintiff suffered a "distinct and palpable injury."<sup>97</sup> Noninjured representative plaintiffs, therefore, cannot maintain a diversity-based section 17200 action in federal court.<sup>98</sup>

While B&P section 17203 representative actions can be brought by both public officials and private parties, no distinction has been made between the two types of plaintiffs in interpreting either the substantive prohibitions of B&P section 17200 or the injunctive or restitutionary remedies available under section 17203.<sup>99</sup> Because dozens of reported appellate court opinions have considered representa-

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95. *People v. Dollar Rent-A-Car*, 259 Cal. Rptr. 191, 197 (Ct. App. 1989) (internal quotation marks and citations omitted). See *infra* text accompanying notes 118-119.

96. *As You Sow v. Sherwin Williams Co.*, No. C-93-3577-VRW, 1993 WL 560086, at \*2 (N.D. Cal. Dec. 21, 1993); see also *Asarco Inc. v. Kadish*, 490 U.S. 605, 606 (1989) (acknowledging that state courts are not bound by Article III standing requirements); *Mangini v. R.J. Reynolds Tobacco Co.*, 793 F. Supp. 925, 929 (N.D. Cal. 1992) (holding that state statutes cannot affect constitutional standing requirements applicable to federal courts).

97. *As You Sow*, 1993 WL 560086, at \*2.

98. The state claims in both *As You Sow* and *Mangini* fell under diversity jurisdiction; however, the same standing requirements would be required if a federal court were to assert supplemental jurisdiction over a state claim. See generally 13 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3531.4 (2d ed. 1984); John C. Yang, *Standing . . . in the Doorway of Justice*, 59 GEO. WASH. L. REV. 1356, 1359-60 (1991).

99. Public officials can obtain civil penalties of up to \$2,500 per unfair practice under B&P § 17206. Private parties, on the other hand, have no statutory right to obtain such civil penalties, and courts have uniformly denied recovery of punitive damages when consumers have brought suit under B&P § 17203. See *Newport Components v. NEC Home Elecs.*, 671 F. Supp. 1525, 1551 (C.D. Cal. 1987). Compensatory damages are not available to any party. See *infra* text accompanying notes 182-205. Also, § 17200 is limited to economic damages. See *Bank of the West v. Atlantic Ins.*, No. C-93-0761-DLJ, 1993 WL

tive action law, the lack of distinction is settled, and opinions interpreting section 17200 in cases brought by public officials are fully applicable to private representative actions.<sup>100</sup>

To give full effect to the deterrent force of the statute, the courts not only grant broad standing, but they also do not require individual proof that the practice was in fact unfair to each affected consumer. Rather, courts permit restitution of any money or property that "may have been" acquired by means of any illegal practice.<sup>101</sup>

Finally, a technical issue over the nature of the representative suing on behalf of the public should be mentioned. Representative actions can be, and usually are, brought by private individuals acting in the public interest. On the other hand, representative actions have been brought by individuals acting *on behalf of a class* of consumers, and it is the class that is acting in the public interest.<sup>102</sup> It would thus be possible to speak of "class representative actions" and "individual representative actions." For convenience, and because it reflects the more common situation, the phrase "representative action" refers to a private action under B&P section 17203, in which the plaintiff is *not* also serving as the representative of a class. There is no circumstance in which it is necessary that a class representative action rather than an individual representative action be brought. The individual representative action is preferable because it is simpler than a class representative action and avoids the difficulties involved in class action notification and certification procedures.<sup>103</sup>

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280655, at \*5 (N.D. Cal. July 19, 1993) (holding there can be no recovery for emotional distress).

100. A relatively new provision enacted in 1992, § 17209 provides that a plaintiff who appeals a decision applying any part of the Unfair Practices Act must notify the Attorney General. CAL. BUS. & PROF. CODE § 17209 (West Supp. 1994). This provision shows the state's concern with the application of the Unfair Practices Act.

101. *Fletcher v. Security Pac. Nat'l Bank*, 591 P.2d 51, 57 (Cal. 1979). See *supra* text accompanying notes 88-92.

102. Examples include: *Fletcher*, 591 P.2d at 55 (see *supra* text accompanying notes 88-92); *Dean Witter Reynolds, Inc. v. Superior Court*, 259 Cal. Rptr. 789 (Ct. App. 1989) (see *infra* text accompanying notes 178-181). These cases involved class actions in which the named plaintiff sued on behalf of a class that was in turn acting for the interests of the general public. *Bronco Wine Co. v. Frank A. Logoluso Farms*, 262 Cal. Rptr. 899 (Ct. App. 1989), was an individual action in which the plaintiff sued on behalf of other grape growers. See *infra* text accompanying notes 216-231.

103. See *supra* text accompanying notes 26-32, 40-49.

## B. Specific Practices Declared Unlawful in Representative Actions

### (1) *Deceptive Practices*<sup>104</sup>

It may well surprise many California lawyers to learn of the extensive precedent approving the use of B&P section 17200 to attack a broad array of abusive practices. In 1972 the California Supreme Court first recognized the expansive scope of B&P section 17200 in a private consumer protection action in *Barquis v. Merchants Collection Ass'n*.<sup>105</sup> In *Barquis* a consumer plaintiff challenged a collection agency's alleged practice of filing actions in improper counties, thereby making it difficult for debtors to defend and leading to more default judgments.<sup>106</sup>

All of the reported private representative actions prior to *Barquis* had been brought by competitors of the defendant alleging *deceptive* practices that harmed their businesses.<sup>107</sup> The defendant argued that representative actions should be limited to competitor torts involving deception. However, the *Barquis* court held that by prohibiting unlawful, unfair, or fraudulent practices under B&P section 17200, the legislature intended to permit courts to enjoin all types of "on-going wrongful business conduct in whatever context such activity might occur."<sup>108</sup> The court added that a trial court is not powerless to enjoin an exploitative business practice merely because that practice is novel.<sup>109</sup> The court stated that "the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable 'new schemes which the fertility of man's invention would contrive.'"<sup>110</sup> Because section 17200 prohibited all "unfair" practices, the statute was viewed by the California Supreme Court as providing a "wide standard" to guide trial courts.<sup>111</sup>

Although expanded use of the section against any wrongful business conduct is authorized, it continues to be primarily used against deceptive or fraudulent business practices. In an opinion heavily cited

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104. Although § 17200 prohibits, among other things, "fraudulent" business practices, courts have traditionally discussed the prohibition as applying to "deceptive" practices. The terms are used interchangeably in this Article.

105. 496 P.2d 817 (Cal. 1972). The California Court of Appeal had recognized the point earlier in *People ex rel. Mosk v. National Research Co.*, 20 Cal. Rptr. 516 (Ct. App. 1962).

106. *Barquis*, 496 P.2d at 819.

107. *Id.* at 828.

108. *Id.* at 829.

109. *Id.* at 830.

110. *Id.* (citing *American Philatelic Soc'y v. Claibourne*, 46 P.2d 135, 140 (Cal. 1935)).

111. *Id.*

in *Barquis, People ex rel. Mosk v. National Research Co.*,<sup>112</sup> the court dealt with a deceptive practice in the debt collection industry. The court held that the defendant's use of mailing materials that simulated state and federal government materials to get information about delinquent debtors violated the predecessor statute to B&P section 17200.<sup>113</sup>

The state Attorney General used section 17200 to charge several door-to-door salesmen with misleading customers with prepared sales pitches containing false representations about their products in *People v. Superior Court (Jayhill)*.<sup>114</sup> In *Jayhill* the California Supreme Court authorized both an injunction as well as an order of restitution as relief in the case.<sup>115</sup>

Similarly, B&P section 17200 was used to challenge defendant's use of the rather common practice of bait and switch in *People v. Custom Craft Carpets*.<sup>116</sup> In that case, a carpet dealer enticed customers by advertising bargain prices. The dealer also instructed its sales people to encourage customers to buy more expensive carpeting by showing them high quality samples first and making disparaging remarks about the low quality carpeting, such as "I wouldn't put that in a doghouse."<sup>117</sup>

Representative actions have also been used to address more sophisticated and subtle forms of deception. In *People v. Dollar Rent-a-Car Systems, Inc.*, the court held that leasing agents falsely representing a "collision damage waiver" as liability insurance constituted an unfair, fraudulent business practice despite the fact that the contract attached to the leasing form explained the waiver in fine print.<sup>118</sup> The court rejected the defense that the misrepresentations were made by low-level employees acting without authority. There was evidence in the record that the employees might have been misinformed by training manuals and that persons in authority were aware of the employees' confusion.<sup>119</sup>

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112. *People ex rel. Mosk v. National Research Co.*, 20 Cal. Rptr. 516, 525 (Ct. App. 1962). This court of appeal opinion was the first reported case in which a representative action was used to protect consumers.

113. *Id.*

114. *People v. Superior Court (Jayhill)*, 507 P.2d 1400 (Cal. 1973).

115. *Id.* at 1402.

116. 206 Cal. Rptr. 12 (Ct. App. 1984).

117. *Id.* at 15.

118. 259 Cal. Rptr. 191, 199 (Ct. App. 1989).

119. *Id.* at 197.



In *Chern v. Bank of America*,<sup>120</sup> a representative action was successfully used to attack the advertising of deceptively low interest rates. By calculations based on a 360-day year, the bank derived a 9% per annum interest rate, which it advertised, although its truth in lending statement revealed an actual 9-1/4% per annum rate. The court was unsympathetic to the defense that the bank's method of calculation was a customary practice in the lending industry.<sup>121</sup>

## (2) *Unlawful Practices*

The *Barquis* opinion also directly establishes that in addition to deceptive practices, business practices that violate a statute can be attacked through representative actions.<sup>122</sup> The court found that the legislature's purpose in enacting the section was "'to extend the meaning of unfair competition to anything that can properly be called a business practice and that at the same time is forbidden by law.'"<sup>123</sup> This interpretation opened the door to actions brought under B&P section 17200 to enjoin a wide variety of business practices, which violate either criminal or civil statutes.

In *Hernandez v. Atlantic Financial Co.*, violations of the Rees-Levering Automobile Sales Finance Act—such as issuing personal loans to buyers, demanding overbroad security agreements, charging excessive interest, and not allowing adequate redemption periods—were enjoined as unlawful business practices.<sup>124</sup> In *Committee on Children's Television, Inc. v. General Foods Corp.*, the court held that violations of the Sherman Food, Drug, and Cosmetic Law, a major California consumer protection statute dating from 1970, could be redressed by a private action charging unfair competition under B&P section 17200.<sup>125</sup>

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120. 544 P.2d 1310 (Cal. 1976).

121. *Id.* at 1316.

122. The California Legislature actually amended Civil Code § 3369 by adding the prohibition against unlawful business practices in 1963, and it was that code section the *Barquis* court considered. As discussed above, Civil Code § 3369 was recodified without change of pertinent wording as B&P Code § 17200 in 1977. See *supra* text accompanying notes 78-79. The *Barquis* court found that the defendant had violated Civil Code § 1812.10 by knowingly commencing actions in an improper venue and that such conduct could be enjoined under § 17200.

123. *Barquis v. Merchants Collection Ass'n*, 496 P.2d 817, 829-31 (Cal. 1972) (internal quotations and citations omitted). This concept was repeated by the court in *Farmers Ins. Exch. v. Superior Court*, 826 P.2d 730 (Cal. 1992).

124. 164 Cal. Rptr. 279, 290 (Ct. App. 1980). The Rees-Levering Automobile Sales Finance Act is codified at CAL. CIV. CODE §§ 2981-2984.4 (West 1993 & Supp. 1994).

125. 673 P.2d 660 (Cal. 1983). The Sherman Food, Drug, and Cosmetic Act is codified at CAL. HEALTH & SAFETY CODE §§ 26000-26851 (West 1984 and Supp. 1994).

Esoteric statutes have also been invoked in representative actions under the unlawful prohibition. In *People v. McKale*, violations of the Mobilehome Parks Act and related sections of the California Administrative Code were challenged as unfair competition.<sup>126</sup> The alleged illegalities included such diverse activities as dumping waste water on the premises, improper burial of underground electrical wiring, failure to maintain sanitary safety installations, and failure to enforce licensing and registration requirements within the mobile home park. Although the authority to enforce violations of the Mobilehome Parks Act was vested in a state commission, the court held that the violations could be asserted as a cause of action for unfair competition by the district attorney.<sup>127</sup> The court noted that the remedies and penalties available under section 17200 are cumulative to any other remedies and penalties available under state laws.<sup>128</sup>

The prohibition of unlawful acts in section 17200 has successfully been invoked in areas outside those of the usual consumer protection concerns. The broad scope for representative actions under the unlawful acts prohibition was used in a representative action to enjoin publication of the Christian Yellow Pages, which excluded advertising by non-Christians in *Pines v. Tomson*.<sup>129</sup> The defendant's policy was found to be discriminatory business conduct in violation of the Unruh Civil Rights Act<sup>130</sup> and, thus, an unlawful business practice. Similarly, the court in *People v. National Ass'n of Realtors* enjoined a limited access multiple listing service because the service violated the California state antitrust law and was therefore unlawful.<sup>131</sup>

Violations of criminal statutes are obviously unlawful practices and have been enjoined under section 17200 as unfair business practices. In *People v. E.W.A.P., Inc.*, the selling of obscene matter was successfully challenged as an unlawful business practice under B&P section 17200.<sup>132</sup> Acts in violation of California Penal Code section 327, making "endless chain" activities a misdemeanor, have also been

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126. 602 P.2d 731 (Cal. 1979). The Mobilehome Parks Act is found at CAL. HEALTH & SAFETY CODE §§ 18000-18153 (West 1984 & Supp. 1994).

127. *McKale*, 602 P.2d at 734-35. Authority was vested in the Department of Housing & Community Development.

128. *Id.* at 735.

129. 206 Cal. Rptr. 866 (Ct. App. 1984).

130. CAL. CIV. CODE §§ 51, 51.5, 52 (West 1982 & Supp. 1994). This Unruh Civil Rights Act prohibits business establishments from discriminating against any person on the basis of religion.

131. 202 Cal. Rptr. 243, 247 (Ct. App. 1984).

132. 165 Cal. Rptr. 73, 74 (Ct. App. 1980). Selling of obscene matter violates the California Penal Code. CAL. PENAL CODE § 311.2 (West 1980 & Supp. 1994).

found to be unlawful business practices.<sup>133</sup> Even the sale of whale meat in violation of a prohibition on the importation of endangered species was found to be a business practice enjoined under B&P section 17200.<sup>134</sup>

However, the broad scope of section 17200 cannot be used to create a cause of action that would otherwise be barred. In *Rubin v. Green*,<sup>135</sup> a law firm sent notices of "intention to commence action" against Cedar Village Mobile Home Park to 450 residents of that park. The park owner attempted to sue the attorneys for solicitation and unfair competition under section 17200 predicated on violations of B&P sections 6152 and 6153.<sup>136</sup> The court held that a defendant in a pending lawsuit cannot sue opposing attorneys on the ground that such attorneys wrongfully solicited the plaintiff. The attorneys' conduct was immune from tort liability under the litigation privilege set forth in California Civil Code section 47(b).<sup>137</sup> The plaintiff could not "plead around" this absolute bar to relief by using section 17200 to relabel the nature of the action.<sup>138</sup>

### (3) *Unfair Practices*

Finally, decisions have specifically held that practices that are neither deceptive nor violative of any law may be enjoined on the basis of being "unfair." This development gives California courts the power to use Federal Trade Commission administrative rules to define "unfair" practices under section 5 of the Federal Trade Commission

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133. *People v. Bestline Prod., Inc.*, 132 Cal. Rptr. 767 (Ct. App. 1967). California Penal Code § 327 defines an "endless chain" activity as a scheme for the distribution of property, under which a participant pays for the chance to receive compensation for introducing more participants into the scheme. CAL. PENAL CODE § 327 (West 1988 & Supp. 1994).

134. *People v. K. Sakai Co.*, 128 Cal. Rptr. 536 (Ct. App. 1976).

135. 847 P.2d 1044 (Cal. 1993).

136. B&P §§ 6152-6153 make the solicitation of clients by attorneys or their agents a misdemeanor. CAL. BUS. & PROF. CODE §§ 6152-53 (West 1990).

137. *Rubin*, 847 P.2d at 1047. California Civil Code § 47 provides immunity for any publication during a judicial proceeding. CAL. CIV. CODE § 47 (West 1982 & Supp. 1994). In the context of attorney-client relationships, this immunity extends to communications in anticipation of litigation. See *Albertson v. Raboff*, 295 P.2d 405 (Cal. 1956) (holding that the recording of a lis pendens notice is clothed with absolute privilege).

138. *Rubin*, 847 P.2d at 1053. See also *Manufacturers Life Ins. Co. v. Superior Court*, 33 Cal. Rptr. 2d 424 (Ct. App.) (holding that the plaintiff could not assert a § 17200 claim based on a violation of the Unfair Insurance Practices Act (UIPA) when the California Supreme Court had determined that there was no private cause of action under the UIPA), review granted, 883 P.2d 386 (Cal. 1994); *Farmers Ins. Exch. v. Superior Court*, 826 P.2d 730 (Cal. 1992) (finding that when a claim is cognizable in the first instance by an administrative agency, a plaintiff may have to first exhaust all administrative remedies before bringing a § 17200 claim).

Act.<sup>139</sup> Such a development is logical given the similarity of both language and purpose between B&P section 17200 and FTCA section 5. This similarity was noted almost three decades ago in *People ex rel. Mosk v. National Research Co.*, in which the court stated that precedents under FTCA section 5 were "more than ordinarily persuasive" in defining the scope of the "unfair or fraudulent" act prohibition in B&P section 17200.<sup>140</sup> Since *National Research*, California courts have been slow to use the applicable federal precedent, but there are recent indications that this has changed.<sup>141</sup>

The first opinion to develop the "unfair" concept was *Bondanza v. Peninsula Hospital & Medical Center*.<sup>142</sup> The decision invalidated the practice of a hospital collection agency of charging one-third of the balance due on hospital bills as the collection agency's commission.<sup>143</sup> Although the court found the practice unlawful because the charges constituted a penalty in violation of the liquidated damages provisions of the California Civil Code,<sup>144</sup> the court went on to state that even if the conduct were not unlawful, it would alternatively hold that the practice violated section 17200 because it was unfair.<sup>145</sup> The court described the promise to pay collection costs as "an adhesion contract which a patient must sign as a condition of admission to the hospital in all except limited emergency situations" and pointed out that a patient who relied on medical insurance to pay "may be penalized for the delays or errors of his insurer."<sup>146</sup> The court enjoined the defendants from assessing collection expenses of any sum that did not represent the actual costs of collecting the debt.

In *People v. Casa Blanca Convalescent Homes*, the court found that the practice of providing insufficient nursing personnel was not only illegal, but also unfair.<sup>147</sup> The court also began what should prove to be a significant line of analysis to determine the meaning of the crucial word "unfair." Acknowledging that "unfair business practices" was not defined in the statute, the court relied on guidelines

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139. 15 U.S.C. § 45 prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1) (West 1973 & Supp. 1994) See *infra* text accompanying notes 148-153.

140. *People ex rel. Mosk v. National Research Co.*, 20 Cal. Rptr. 516, 521-22 (Ct. App. 1962).

141. See *infra* text accompanying notes 148-157.

142. 590 P.2d 22 (Cal. 1979).

143. *Id.* at 22.

144. CAL. CIV. CODE § 1671 (West 1985 & Supp. 1994).

145. *Bondanza*, 590 P.2d at 26.

146. *Id.*

147. 206 Cal. Rptr. 164, 177 (Ct. App. 1984).

established by the Federal Trade Commission and approved by the United States Supreme Court in *FTC v. Sperry & Hutchinson Co.*<sup>148</sup> In *Sperry & Hutchinson* the Court quoted the then-applicable FTC test for determining if a practice is unfair:

- (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).<sup>149</sup>

Tracking the quoted language, the court in *Casa Blanca* held that a business practice may be enjoined as unfair when it “offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.”<sup>150</sup>

In *Mangini v. R.J. Reynolds Tobacco Co.*, the court used the FTC definition of unfairness as the sole basis for finding that an advertising campaign could violate section 17200.<sup>151</sup> The suit had been brought under the Federal Cigarette Labeling Act (FCLA) and B&P section 17200 to enjoin the defendant’s “Old Joe Camel” advertising campaign. The plaintiff premised the section 17200 action on three theories: (1) failure to place warning of cigarette hazards in advertisements, (2) glamorizing cigarette use without disclosure of hazards, and (3) targeting the advertisement toward minors to in-

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148. 405 U.S. 233 (1972).

149. *Id.* at 244-45 n.5. In 1980 the FTC amended its policy statement for determining unfairness with the following additional language: “To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.” See *American Fin. Serv. v. FTC*, 767 F.2d 957, 971 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986). This “Policy Statement” was derived from a letter the FTC wrote to Senators Danforth and Ford reprinted in H.R. REP. NO. 156, 98th Cong., 1st Sess., pt. 1, at 33-40 (1983). The policy statement has not been codified. See *FTC Chairman Expresses Concerns on Restrictions in Reauthorization Bill*, [Jul.-Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 1621 (July 1, 1993); *FTC Authorization Report Opens Door to Future Compromise on Unfairness*, [Jul.-Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 1585 (Oct. 8, 1992). Obviously the second and third tests in the 1980 statement (“countervailing benefits” and “reasonably avoidable”) are in addition to the criteria contained in the old FTC test.

150. *Casa Blanca*, 206 Cal. Rptr. at 177.

151. *Mangini v. R.J. Reynolds Tobacco Co.*, 21 Cal. Rptr. 2d 232 (Ct. App. 1993), *aff’d*, 875 P.2d 73 (Cal. 1994). Although affirmed by the supreme court, the appellate court opinion is officially unpublished under the state’s appellate rules. CAL. R. CT. 976(d).

crease cigarette purchasing that is illegal under California law.<sup>152</sup> The court ruled that the first two theories were preempted by the FCLA because that statute proscribes lawsuits against cigarette manufacturers based upon a "failure to warn." The court allowed the section 17200 complaint to proceed under the third "targeting" theory by finding that the advertising campaign was "unfair" under the FTC definition quoted in *Sperry & Hutchinson*.<sup>153</sup> The court concluded that the advertising campaign—in targeting minors—offended the public policy as established by the statute prohibiting the sale of cigarettes to minors and was unscrupulous in luring minors into an unhealthy addiction, thereby causing physical injury.<sup>154</sup>

The California Supreme Court affirmed the appellate court decision in *Mangini*, but did not reach the appellate court findings on the unfairness of the advertisements.<sup>155</sup> The defendant did not challenge whether the "targeting" theory stated a valid cause of action under section 17200, but solely contended that the theory was preempted by the FCLA.<sup>156</sup> The supreme court held that the cause of action was not preempted because the duty not to advertise or unfairly assist illegal conduct was not encompassed within the FCLA.<sup>157</sup>

It is fair to say that since the *Barquis* decision, California courts have consistently construed section 17200 broadly to require honesty, legality, and fair dealing in business practices affecting consumers. The statute has often been invoked to enjoin business conduct that falls short of those standards. The expansive interpretation of section 17200, recently restated in *Farmers Insurance*, makes it clear that the same broad standards will continue to be applied to California business conduct.<sup>158</sup>

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152. *Mangini*, 21 Cal. Rptr. 2d at 236-38. The statutory prohibition on cigarette sales to minors is found in CAL. PENAL CODE § 308 (West 1988).

153. *Mangini*, 21 Cal. Rptr. 2d at 241.

154. *Id.*

155. *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73 (Cal. 1994).

156. *Id.* at 78.

157. *Id.* at 82.

158. See *supra* note 81 and accompanying text. But cf. *Starbuck v. Kaiser Found. Health Plan, Inc.*, 275 Cal. Rptr. 444, 446 (Ct. App. 1991) (ordered unpublished on Feb. 14, 1991) (holding that B&P § 17200 applied only to either "a primary part of . . . business activities" of a defendant or to conduct directly related to that activity). The opinion was apparently based upon the idea that *Barquis* read B&P § 17200 to authorize that section's extraordinary procedures and relief for consumers and that it is logical to limit the holding of *Barquis* to apply to only the type of activity that the court was concerned with in that opinion. Because it is unpublished, the *Starbuck* opinion is not considered precedent for any purposes under California law.

### C. Use of Representative Actions in Private Consumer Protection Litigation

#### (1) *Pleading the Elements*

The California Supreme Court recognized private use of the representative action statute to protect consumers as early as 1972, but only within the last few years have appellate courts clearly established the full potential for consumer use of section 17200. While there are a number of unresolved issues raised by section 17200, the significant features of private representative actions have been established to the point where the private bar and trial courts should be fully aware of this valuable device.

A crucial point in connection with B&P section 17204 is that the only theoretical basis for the standing established by the section is that the plaintiff can effectively represent the group's interests. This basis for representative actions is a slight variation on the traditional interest theory justification for class actions. The intense concern about obtaining consent in class action procedures derives from the theoretical basis for modern class action damage recovery. This concern, therefore, is not present in representative action law. This relative lack of concern about consent produces many advantages for consumers seeking recovery through representative actions.

In 1972 the California Supreme Court analyzed the legislative history of section 17200 in *Barquis v. Merchants Collection Ass'n* and concluded that the section authorized private parties to obtain injunctions against any business conduct that was unlawful, deceptive, or unfair.<sup>159</sup> While this conclusion appears to flow from the language of the statute, the defendant maintained that the California Supreme Court had never approved the section as a vehicle for attacking practices that had no impact upon competition.<sup>160</sup> The court, partially relying on language of the court of appeal in *People ex rel. Mosk v. National Research Co.*, rejected the contention.<sup>161</sup> The court continued:

We conclude that in a society which enlists a variety of psychological and advertising stimulants to induce the consumption of goods, consumers, rather than competitors, need the greatest protection from sharp business practices. Given the terms of the section, the purpose of the enactment and the controlling precedent, we reject

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159. The review of the legislative history of then-California Civil Code § 3369, which became §§ 17200-17209, is found in *Barquis*, 496 P.2d at 828-29.

160. *Barquis*, 496 P.2d at 828.

161. *Id.* at 829 (quoting *People ex rel. Mosk v. National Research Co.*, 20 Cal. Rptr. 516, 520 (1962)).

defendant's suggested limitation of section 3369 to "anti-competitive" business practices.<sup>162</sup>

The linking by the court of the recognized need for increased consumer protection with an expansive interpretation of section 17200 has been repeated in subsequent opinions of the California Supreme Court and the courts of appeal.<sup>163</sup> In *Barquis* the plaintiff sought an injunction and the propriety of such relief, given the terms of the statute, was clear. In later cases, however, connecting the concept of the need to protect consumers with the equitable nature of representative actions has resulted in truly expansive holdings. The most important of these decisions was rendered by the California Supreme Court in *Fletcher v. Security Pacific National Bank*.<sup>164</sup>

The court in *Fletcher* addressed important alternative procedural and remedy issues raised by a class of consumers who claimed to have been victimized by the defendant's use of the "360-day year" in calculating the daily rate of interest the consumers owed on loans from the defendant bank.<sup>165</sup> The plaintiffs sought restitution of the illegally obtained interest in excess of that which the defendant would have been entitled to receive had it used a 365-day year to calculate interest. In separate causes of action on behalf of the class, the plaintiff alleged that the defendant's collection of excess interest was a breach of the loan contract and that the defendant's action was an unfair trade practice under section 17500.<sup>166</sup>

The trial court sustained the defendant's demurrer to both causes of action. The ground for the lower court ruling was that maintenance of a class under either cause of action was infeasible because of the requirement of individual proof of each borrower's lack of knowledge that defendant used a 360-day year to calculate interest.<sup>167</sup> The California Supreme Court affirmed the trial court's ruling as to the class action for breach of contract damages, but reversed the ruling denying

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162. *Id.* (citing *Vasquez v. Superior Court*, 484 P.2d 964, 968 (Cal. 1971)).

163. *See, e.g., Farmers Ins. Exch. v. Superior Court*, 826 P.2d 730, 734 (Cal. 1992); *Committee on Children's Television v. General Foods Corp.*, 673 P.2d 660, 667 (Cal. 1983); *Fletcher v. Security Pac. Nat'l Bank*, 591 P.2d 51, 57 (Cal. 1979); *People v. Thomas Shelton Powers, M.D., Inc.*, 3 Cal. Rptr. 2d 34, 40 (Ct. App. 1992); *People v. Parkmerced Co.*, 244 Cal. Rptr. 22, 27 (Ct. App. 1988).

164. 591 P.2d 51 (Cal. 1979).

165. *Id.* at 58-59. The California Supreme Court had previously determined that the use of a "360-day year" to calculate interest was an unfair practice under B&P § 17500 in *Chern v. Bank of America*, 544 P.2d 1310 (Cal. 1976). *See supra* text accompanying notes 116-117.

166. *Fletcher*, 591 P.2d at 55.

167. *Id.* at 54.



the class action recovery under section 17500 for an unfair trade practice.

On the section 17500 cause of action, the court held that a trial court in a representative action has the authority to order restitution of monies obtained by an unfair business practice *without* "individualized proof of lack of knowledge" of the members of the public.<sup>168</sup> This result followed from the language of section 17203 authorizing the trial court to "make such orders . . . which may be necessary to restore to any person in interest any money or property . . . which may have been acquired by means of any practice . . . declared to be unlawful."<sup>169</sup>

Defendant Security Pacific Bank argued strenuously that the quoted language required the plaintiff to prove that all monies to be restored must have been acquired by the defendant as the result of the unfair business practice. This in turn meant that lack of knowledge of the practice of each person receiving restitution would have to be proven. The court rejected this argument on two grounds. First, the statute requires only that the property subject to restoration *may* have been acquired as the result of the unfair business practice. The court held that this language is "unquestionably broad enough to authorize a trial court to order restitution," upon a showing that the practice was unfair without regard to the public's knowledge of the practice.<sup>170</sup> Secondly, the court quoted *Vasquez v. Superior Court* on the high priority for protecting consumers from abuse and held that restitution of wrongful gain was vital to that purpose.<sup>171</sup> Requiring proof that individual borrowers lacked knowledge would make restitution of a large portion of the wrongful gain too burdensome or expensive to achieve. Given the broad equity power of trial courts under representative actions, the court held that restitution without individual proof of deception was well within the trial court's power.<sup>172</sup> The case, therefore, was remanded to the trial court for further proceedings.

In *Fletcher* the California Supreme Court articulated an additional principle of great significance: restitution of the type sought by the plaintiff class could also be obtained by an *individual plaintiff* in a representative action. As acknowledged by the court, a representative

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168. *Id.* at 54, 57-59.

169. *Id.* at 56 (quoting CAL. BUS. & PROF. CODE § 17535). The language of B&P § 17203 is identical to § 17535. See *supra* text accompanying note 84.

170. *Fletcher*, 591 P.2d at 56-57.

171. *Id.* at 57 (citing *Vasquez v. Superior Court*, 484 P.2d 964, 968 (Cal. 1971)). See *supra* text accompanying notes 17-18.

172. *Fletcher*, 591 P.2d at 57-58.

action "may eliminate the potentially significant expense of pretrial certification and notice, and thus may frequently be a preferable procedure to a class action."<sup>173</sup> Justice Clark's dissent agreed with the majority on this point and elaborated on the advantage of an individual bringing a representative action rather than suing as a representative plaintiff in a class action.<sup>174</sup>

In two 1983 opinions, California appellate courts repeated the *Fletcher* holding that representative actions do not require allegations or individualized proof of "deception, reasonable reliance, and damage."<sup>175</sup> In one of the opinions, *Committee on Children's Television*, the California Supreme Court held that a plaintiff has standing to seek relief "on behalf of the general public" in a representative action, without regard to whether the plaintiff was deceived or affected in any way by the alleged unfair practice.<sup>176</sup> Although certain plaintiffs in the action were organizations, this fact was held to have no effect on their standing to bring a representative action.<sup>177</sup>

In the second opinion, *Dean Witter Reynolds, Inc. v. Superior Court*,<sup>178</sup> a court of appeal developed the point noted in *Fletcher* that a representative action could be used to obtain restitutionary relief for individuals without the pretrial notice and certification procedures required in class actions. The plaintiff brought a class action alleging that the defendant's imposition of maintenance and termination fees on individual retirement accounts constituted an unfair trade practice under section 17200. The complaint sought damages for a class consisting of the defendant's customers who had paid the fees in dispute. The appellate court held that there was no showing that a class action was superior to a representative action as a means of resolving the

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173. *Id.* at 59.

174. Justice Clark emphasized that no class action was necessary because any appropriate relief for plaintiff and the class could be obtained in an individual representative action. See *Fletcher*, 591 P.2d at 62-63. Justice Clark explained: "[B]ecause plaintiff in an individual action may recover for his class any or all of the relief appropriate under the section, there is no reason to allow or to compel the plaintiff to incur the great expenditure of money and time incident to a class action." *Id.* at 61. He concluded: "The convenience of the litigants and court is not served by permitting or requiring plaintiff to march to the courthouse with his proposed 50,000 associates when he can as effectively go to the courthouse alone." *Id.* at 62.

175. *Committee on Children's Television, Inc. v. General Foods Corp.*, 673 P.2d 660, 668 (Cal. 1983).

176. *Id.* at 671 (quoting *Hernandez v. Atlantic Fin. Co.*, 164 Cal. Rptr. 279 (Ct. App. 1980)).

177. *Id.*

178. 259 Cal. Rptr. 789 (Ct. App. 1989).

allegations of the complaint.<sup>179</sup> Since a class action cannot be maintained without a finding that class action treatment of the controversy is superior to other available methods of adjudicating the controversy, the court reversed the trial court ruling certifying the class.

The court noted that a representative action brought by an individual uses a "streamlined procedure expressly provided by the Legislature," which avoids the difficult and expensive tasks of pretrial notice and certification necessary for a class action.<sup>180</sup> *Dean Witter* thereby established the proposition that in certain situations a case *must* be maintained as a representative action rather than as a class action if the same relief may be obtained through either procedural device.<sup>181</sup>

## (2) *Money Damages*

Until recently, the question of whether compensatory damages could be recovered in an individual representative action was undecided. In *Bank of the West v. Superior Court*, however, the California Supreme Court clearly stated that compensatory damages are not available under a section 17200 action.<sup>182</sup> Understanding the impact of *Bank of the West* requires the following background.

Early appellate court cases interpreting section 17200 allowed the recovery of damages as well as an injunction in unfair competition suits by competitor plaintiffs advancing claims on which damages traditionally are available.<sup>183</sup> Later, *United Farm Workers v. Superior Court* allowed a labor union plaintiff to recover damages in a section

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179. *Id.* at 798-99.

180. *Id.* at 799.

181. The *Dean Witter* opinion notes that no class need be certified because the court in a representative action "is empowered to grant equitable relief, including restitution in favor of absent persons, without certifying a class action." *Id.* See also *Caro v. Proctor & Gamble Co.*, 22 Cal. Rptr. 2d 419 (Ct. App. 1993). In *Caro* plaintiff brought a class action against an orange juice manufacturer for allegedly deceptive labeling. The court refused to certify the plaintiff class because of problems with individual proof of reliance and named plaintiff's ability to represent the class. The court noted that the plaintiff had failed to show that a class action would be superior to a representative action. The plaintiff failed to show that a class action was superior to other available means of adjudication. *Id.* at 428.

182. *Bank of the West v. Superior Court*, 833 P.2d 545, 557 (Cal. 1992).

183. See, e.g., *Hesse v. Grossman*, 313 P.2d 625, 629 (Cal. Dist. Ct. App. 1957) (awarding damages for lost profits under § 3369 to an artist damaged when a business competitor copied and sold his original artwork); *Wood v. Pepper*, 130 P.2d 220, 226 (Cal. Dist. Ct. App. 1942) (finding misrepresentations by a business competitor violated Civil Code § 3369 because evidence of lost profit damages was insufficient, but noting that had it been sufficient, damages would have been an appropriate remedy).

17200 action.<sup>184</sup> The case involved the allegation that the defendant used the plaintiff's union emblem to falsely indicate that goods it sold were union-made. The appellate court concluded:

[T]he breach of a duty imposed by statute gives rise to a cause of action for damages if damages can be shown. The fact that the statutes sound in equity and by their terms do not specify that damages may be awarded does not bar the recovery of damages in a proper case even though the action be one in equity rather than law.<sup>185</sup>

In *Chern v. Bank of America*, decided one year later, the state supreme court stated in dictum that the remedy in section 17200 representative actions was limited to injunctive relief.<sup>186</sup> The court offered no rationale for that statement and did not mention *United Farm Workers* and other cases that approved damage awards.<sup>187</sup>

The conflict between *United Farm Workers* and *Chern* was noted but not resolved by the California Supreme Court, in *Committee on Children's Television*.<sup>188</sup> Thereafter, two court of appeal decisions ruled that damages are not generally recoverable under section 17200.<sup>189</sup> In *Industrial Indemnity Co. v. Superior Court*, plaintiffs sought compensatory and punitive damages for the alleged failure to settle in violation of the California Insurance Code.<sup>190</sup> The court stated that "no damages [are] available to a private litigant under Business and Professions Code, Section 17203,"<sup>191</sup> but the court noted that *United Farm Workers* properly allowed damage recovery under the well-accepted ancillary tort theory. Under that theory, "the existence of a penal or regulatory statute [e.g., section 17200] made for the benefit of that class of consumers [gives] the members of the class a right to sue in tort."<sup>192</sup>

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184. *United Farm Workers of Am. v. Superior Court*, 120 Cal. Rptr. 904 (Ct. App. 1975).

185. *Id.* at 911.

186. *Chern v. Bank of Am.*, 544 P.2d 1310, 1315-16 (Cal. 1976). The court upheld the grant of summary judgment to the bank because plaintiff was not misled and did not allege that anyone was actually misled by defendants' conduct. *Id.* at 1315. Since plaintiff was not a member of the class she sought to represent and could not prevail on the merits, the court had no aggrieved parties before it and could not decide the rights of such individuals. *Id.*

187. *Id.* at 1316.

188. *Committee on Children's Television, Inc. v. General Foods Corp.*, 673 P.2d 660, 668 (Cal. 1983).

189. *Dean Witter Reynolds, Inc. v. Superior Court*, 259 Cal. Rptr. 789 (Ct. App. 1989); *Industrial Indem. Co. v. Superior Court*, 257 Cal. Rptr. 655 (Ct. App. 1989).

190. *Industrial Indem.*, 257 Cal. Rptr. at 656.

191. *Id.*

192. *Id.* at 657. The court's statements in *Industrial Indemnity* were premised upon the existence of a private right of action for insureds under the California Insurance Code.

In *Dean Witter* a different court held that "the better rule denies compensatory damages as distinct from the equitable remedy of restitution."<sup>193</sup> The court reasoned:

The exclusion of claims for compensatory damages is also consistent with the overarching legislative concern to provide a *streamlined* procedure for the prevention of ongoing or threatened acts of unfair competition. To permit individual claims for compensatory damages to be pursued as part of such a procedure would tend to thwart this objective by requiring the court to deal with a variety of damage issues of a higher order of complexity.<sup>194</sup>

The *Dean Witter* court did not mention the ancillary tort theory.

In *Bank of the West* the California Supreme Court put the issue to rest. Plaintiff insurers in *Bank of the West* sought a declaratory judgment as to their obligation under a comprehensive general liability (CGL) insurance policy,<sup>195</sup> and the court held that the CGL provision insuring payment of claims of injury for "unfair competition" did not apply to damages paid by the insured in a section 17200 action.<sup>196</sup> The court held that the CGL was intended to cover only damages paid on claims of common-law unfair competition, which is distinguishable from the definition of unfair competition found in section 17200.<sup>197</sup> In making the point, the court noted that compensatory damages are available under the common-law cause of action, but that restitution is the only monetary relief authorized by section 17203.<sup>198</sup> The court recognized the confusion created by *United Farm Workers* and *Chern*,

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CAL. INS. CODE § 790.03(h) (West 1993). The California Supreme Court had recently overruled its prior decision that recognized a private right of action under the statute. See *Moradi-Shalal v. Fireman's Fund Ins.*, 758 P.2d 58, 68 (Cal. 1988) (holding that *Royal Globe Ins. Co. v. Superior Court*, 592 P.2d 329 (Cal. 1979), is no longer valid and that there is no private right of action under § 790.03(h)). Thus, the *Industrial Indemnity* court could not allow damages under an ancillary tort theory. The general validity of the ancillary tort concept was, however, unaffected by the overruling of *Royal Globe*. *Industrial Indem.*, 257 Cal. Rptr. at 657.

193. *Dean Witter Reynolds, Inc. v. Superior Court*, 259 Cal. Rptr. 789, 799 (Ct. App. 1989). See *supra* text accompanying notes 178-181.

194. *Dean Witter*, 259 Cal. Rptr. at 799. This rationale is inapplicable if damages can be determined on the same basis for all affected consumers. Therefore, in situations in which a uniform amount of statutory damages is available to each consumer represented in the § 17200 action, the *Dean Witter* holding would be inapplicable, and the issue of damage recovery should be decided by the trial court.

195. *Bank of the West v. Superior Court*, 833 P.2d 545, 547 (Cal. 1992). CGL insurance policies generally include coverage for "advertising injury." This coverage normally applies to damages caused by the insured's "unfair competition" during "advertising activities." *Id.*

196. *Id.* at 557.

197. *Id.* at 552.

198. *Id.* at 552-53.

but held that *Chern* had effectively overruled the earlier case.<sup>199</sup> Although *Committee on Children's Television* had expressly declined to decide the issue, the court was now of the view that *Chern* had decided the question.<sup>200</sup>

*Bank of the West* also probably denies recovery under the ancillary tort theory. In *Industrial Indemnity* the appellate court had followed *United Farm Workers* to distinguish between damages recoverable as part of a section 17200 action and those under an ancillary tort theory.<sup>201</sup> The *Bank of the West* opinion, however, states that *Chern* effectively overruled *United Farm Workers*.<sup>202</sup> Although the court's discussion of the compensatory damages issue is dictum, the definite language of the court and the relation between the court's reasoning and the holding in *Bank of the West* appears to further argument on the ancillary tort theory.<sup>203</sup>

Even if compensatory damages are not available, B&P section 17203 provides for flexible orders of restitution, which will usually provide satisfactory relief for consumers.<sup>204</sup> Under the section, consumers can obtain orders of contract rescission and restitution of monies paid to the seller as well as a refund of unlawful charges such as usurious interest, unlawful liquidated damages, or undisclosed transaction fees.<sup>205</sup> Restitution also meets the disgorgement goal of section 17200. Almost invariably consumers will be better served by the speed and simplicity of a representative action leading to an order of restitution, as compared to a class action in which compensatory damage awards are possible.

### (3) *Fluid Recovery and Disgorgement*

The use of fluid class recovery as a procedural device to obtain disgorgement in a representative action was recognized in two recent court of appeal decisions. In the first, *People v. Parkmerced Co.*, the

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199. *Id.* at 557.

200. *Id.*

201. *Industrial Indem. Co. v. Superior Court*, 257 Cal. Rptr. 655, 657 (Ct. App. 1989).

202. *Bank of the West v. Superior Court*, 833 P.2d 545, 557 (Cal. 1992).

203. The only reservations from this position must be based on the fact that the *Bank of the West* opinion does not specifically mention the ancillary tort theory. The opinion in *United Farm Workers*, however, was based exclusively on that theory, and *Bank of the West* makes clear that *United Farm Workers* is no longer good law.

204. B&P §§ 17203 and 17535 authorize any "orders or judgments . . . as may be necessary to restore any person . . . money or property . . . which may have been acquired by means of" unfair competition. CAL. BUS. & PROF. CODE §§ 17203 & 17535 (West 1987 & Supp. 1994).

205. See discussion of restitutionary relief in text accompanying notes 247-251.

trial court ordered the defendant landlord to refund unlawfully retained security deposits to all present and former tenants.<sup>206</sup> The trial court ordered that refunds owed to unlocated former tenants be paid to an organization of the landlord's tenants that generally represented the tenants' interests and had assisted the district attorney in bringing the public representative action. The case was the first reported use of fluid recovery with a consumer trust fund in an individual representative action.

The reasoning supporting fluid recovery in an individual representative action is thoroughly discussed in *People v. Thomas Shelton Powers, M.D., Inc.*<sup>207</sup> In that case, the San Francisco District Attorney brought a representative action alleging that the defendant used an unfair business practice in selling certain condominiums. The condominiums were restricted by law for sale to low and moderate income purchasers at below market rates. The defendant illegally sold the condominiums to purchasers with high incomes at the prevailing market price. Along with an injunction and civil penalties, the district attorney sought an order that the defendant "disgorge the profits obtained by selling said units at an excessive price."<sup>208</sup> The trial court held that it did not have the power to order disgorgement of any funds that would not be restored to specific individuals harmed by the unfair business practice.<sup>209</sup>

The court of appeal reversed, holding that the lack of a cognizable victim to whom an award of restitution can be made does not prevent a court from ordering a defendant to disgorge illegally derived profits.<sup>210</sup> Citing *Fletcher*, the court noted that deterrence of unfair business practices requires that wrongdoers be prevented from keeping illegal profits.<sup>211</sup> Where disgorgement cannot be made to direct victims, the court, citing *Market Street Railway*, *Levi Strauss*, and *Parkmerced*, authorized the use of fluid recovery procedures including earmarked escheat and payment "to an interested third party" such as the tenant's association in *Parkmerced*.<sup>212</sup>

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206. 244 Cal. Rptr. 22, 27 (Ct. App. 1988).

207. 3 Cal. Rptr. 2d 34 (Ct. App. 1992).

208. *Id.* at 37.

209. *See id.* at 41.

210. *Id.*

211. *Id.* at 40.

212. *Id.* at 41-42. *See also* *People v. Morse*, 25 Cal. Rptr. 2d 816 (Ct. App. 1993) (holding that an attorney who advertised deceptively was ordered to pay \$400,000 in *cy pres* ("next best use") restitution), *cert. denied*, 115 S.Ct. 83 (1994).

Describing appellate opinions approving restitutionary awards, the court stated:

The cases did not turn on the ability to name specific persons as victims, but on the equities of preventing the defendant from benefiting from the illegal transaction and of reversing the harm of the wrongful act to the greatest extent possible. We see no reason to reach a different result here.<sup>213</sup>

This approach differs significantly from the requirement of proof of actual damage to individual members in class actions.<sup>214</sup> With the *Powers* opinion, equitable remedies needed for effective representative actions have been authorized.

#### (4) *Inappropriate Use of Representative Actions*

The court in *Dean Witter*, discussed above, recognized the "abstract possibility" that in some situations a class action may afford victims a better opportunity to protect their interests than would a representative action.<sup>215</sup> In *Bronco Wine Co. v. Frank A. Logoluso Farms*, issued after *Dean Witter*, the court of appeal reversed the trial court's approval of a representative action and held that a class action was the only acceptable procedure.<sup>216</sup> A comparison of *Dean Witter* and *Bronco Wine* indicates that representative actions should be limited to consumer cases and should not be used in a business context in which substantial damages have been incurred.<sup>217</sup>

In *Bronco Wine* a grape grower sued a winery for a breach of contract to pay for the grower's grapes. The grower also brought a representative action alleging unfair competition that damaged plaintiff and other grape growers. On the breach of contract cause of action, the trial court held that the defendant had breached the contract by paying the plaintiff grower a price that was substantially less than the price specified in the contract. The total damage award to Logoluso for the breach of contract was approximately \$400,000, which included an award of prejudgment interest. This portion of the trial court judgment was affirmed by the court of appeal.

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213. *Powers M.D., Inc.*, 3 Cal. Rptr. 2d at 42.

214. See *supra* text accompanying notes 73.

215. *Dean Witter Reynolds, Inc. v. Superior Court*, 259 Cal. Rptr. 789, 799 (Ct. App. 1989). See *supra* text accompanying notes 178-181.

216. 262 Cal. Rptr. 899 (Ct. App. 1989).

217. Because of the large dollar amounts involved in *Bronco Wine*, individual suits, not a class action, may have been the best way to protect the parties' interests in that case. The court noted that at least one person suffering damages might have chosen to forego recovery in order to maintain an ongoing business relationship with the defendant. See *infra* text accompanying note 229.



On the representative cause of action, the trial court awarded a total of \$457,005 in restitutionary recovery to 27 nonparty growers. The challenged unfair practice related to the winery's deviation from its announced schedule of prices it would pay. The defendant represented that the schedule was based on the percent of sugar content of grapes.<sup>218</sup> The trial court found that the winery secretly determined the price at which it purchased grapes on the basis of visible defects, rather than sugar content, resulting in substantial underpayment to each of the nonparty growers.<sup>219</sup> Fixing the amount of damage to each of the nonparty growers from the winery contracts and the tonnage delivered by each of the nonparty growers,<sup>220</sup> the court ordered the winery to refund the amounts it had withheld because of the unfair business practice.<sup>221</sup>

The trial court denied the defendant's motion to strike the representative cause of action or, alternatively, for an order requiring the plaintiff to comply with class action procedures. After extended analysis, the court of appeal held that "the [trial] court abused its discretion in denying Bronco's pretrial motion and committed reversible error by awarding restitution damages to the nonparty owners in the manner employed."<sup>222</sup>

The trial court had failed to consider language in *Fletcher* holding that representative actions are not a matter of right, but are permissible only at the discretion of the trial court.<sup>223</sup> The *Bronco Wine* court further noted that *Fletcher* specified that a trial court, in exercising its discretion, must consider whether the representation of the nonparties will be adequate in a representative action when compared to the representation for such nonparties in a class action.<sup>224</sup>

The court of appeal in *Bronco Wine* noted that the *Dean Witter* opinion had stated that a judgment in a representative action would not be binding upon nonparties, and individual representative actions could otherwise present serious questions of procedural due process.<sup>225</sup> In *Dean Witter* the court had held that a representative action

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218. *Bronco Wine*, 262 Cal. Rptr. at 900.

219. *Id.* at 908, 909.

220. *Id.* at 909.

221. *Id.*

222. *Id.* at 912.

223. *Id.* at 911.

224. *Id.* More generally, the *Fletcher* court stated: "Before exercising its discretion, the trial court must carefully weigh both the advantages . . . of an individual action against the burdens and benefits of a class proceeding for the underlying suit." *Fletcher v. Security Pac. Nat'l Bank*, 591 P.2d 51, 59 (Cal. 1979).

225. *Bronco Wine*, 262 Cal. Rptr. at 911-12.

was preferable to a class action in that case. The *Bronco Wine* court held that, in the case before it, a class action was preferable to a representative action. The facts in *Dean Witter* were distinguished on three grounds. First, the fact and amount of liability of the defendant to each of the nonparties in that case was a relatively simple question, as opposed to the complex determinations of fact and amount of liability of the defendant in the case before the court. Second, in *Dean Witter* the amount of restitution for each nonparty was nominal, while in the case at bar the restitutionary awards were substantial.<sup>226</sup> Finally, the nonparties in the case before the court had a prior opportunity to recover underpayments in an inexpensive and effective administrative hearing, which they chose not to exercise.

The *Bronco Wine* opinion establishes four considerations that can limit the availability of representative action procedures in group litigation. First, a trial court has the discretion to reject representative action procedures in favor of class action procedures. Second, in exercising that discretion, a trial court must focus on whether there are relative practical benefits from the use of representative action procedures. Third, if the amount of restitution per ascertainable claimant is large, procedural due process principles would be compromised by representative action procedures. Finally, a number of factors must be considered in the exercise of a trial court's discretion including: complexity of individual factual issues, the amount of individual recovery, and the availability or rejection of other means for nonparties to obtaining restitution.

Few would argue with the result in *Bronco Wine*. That case involved sophisticated business transactions and individual damage claims in such large amounts that traditional forms of individual or class representation, leading to binding judgments were appropriate.<sup>227</sup> Similarly, the use of representative actions in consumer cases, such as *Fletcher* and *Dean Witter*, is warranted, and the holding in *Dean Witter* that a trial court would be committing error in not allowing an individual representative action to proceed in that case appears justifiable.

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226. The *Bronco Wine* court noted that due process concerns, though not unimportant, are less compelling when the dollar amount in question is small. *Id.* at 912. The first two distinguishing facts, the complex factual issue and the large liability, actually argue for individual action treatment not for class action certification. See generally 7A CHARLES A. WRIGHT ET AL., FEDERAL PROCEDURE AND PRACTICE: CIVIL §§ 1785-1788 (1972).

227. The court questioned the utility of a nonbinding procedure, especially since the large individual recoveries would be an incentive to relitigate. *Bronco Wine*, 262 Cal. Rptr. at 911.

While the *Bronco Wine* court identified significant differences between the facts in that case and those in *Dean Witter*, a crucial problem in the case was not discussed: the preemptory nature of the trial court determination of the right and amount of recovery for each of the identified nonparties without notice to or appearances by those nonparties. Under the procedure approved by the trial court, none of the nonparties had a meaningful opportunity to be heard before a significant right of each to damage recovery was determined. In the words of the *Bronco Wine* court, "[t]he nonparty growers had no opportunity to present their claims before the trial court by counsel of their own choice."<sup>228</sup> At least one nonparty grower wanted to forego recovery from the defendant to maintain a beneficial business relationship and clearly should have been given the opportunity to exercise that choice.<sup>229</sup> In addition, the amount of the defendant's liabilities was determined exclusively from the records of the defendant.<sup>230</sup> An individual nonparty grower might wish to prove that the defendant's records were mistaken, yet under the trial court's procedure, the nonparty neither received official notice of the trial nor had an opportunity to present proof. The court of appeal specifically chose not to decide whether the procedure used by the trial court complied with the requirements of procedural due process.<sup>231</sup>

In cases such as *Fletcher* and *Dean Witter*, the representative actions were brought for the benefit of consumers not business entities. Those actions were not used as vehicles for deciding complicated questions of fact establishing different amounts of restitution due each nonparty. Instead, as stated in the *Powers* opinion mentioned above, the focus of these actions was to determine whether a generally uniform practice of the defendant was an unfair business practice and the total amount of money the defendant obtained from all of the nonparties.<sup>232</sup> Posttrial notification procedures, similar to those used in the *Levi Strauss* and *Parkmerced* cases could then be used. Nonparties entitled to restitution would be notified by the defendant, by a process approved by the court, and could obtain restitution by submitting claims. Alternatively, in some circumstances, if the defendant has the

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228. *Id.* at 910.

229. *Id.* at 910-11.

230. *Id.* at 909.

231. *Id.* at 911. However, as the court noted, the nonparties are not bound by an individual representative action as they would be in a class action. *Id.* The nonparties thus could relitigate the issues.

232. See *supra* text accompanying notes 207-214 and *infra* text accompanying notes 248-250.

current addresses of ascertained nonparty claimants, the defendant could be ordered to send amounts of restitution directly to those individuals without any claims-based procedure.

A representative action should be maintainable when the issue of individual entitlement to restitution involves relatively simple factual issues, as in *Dean Witter*, and the amount of restitution owed to each individual nonparty can be quickly determined either by simplified court procedures (as in *Levi Strauss*) or through notification by the defendant (as in *Parkmerced*). If the liability issue is complex, the trial court should consider whether the amount of restitution to each affected individual is so small, relative to the cost of prosecuting an individual action, that the defendant will, because of practical considerations, end up keeping the monies it has obtained by unfair business practices unless a representative action is permitted.

Under the evolving law of representative actions, such actions can be maintained by private parties in appropriate situations. Reported examples include, *Fletcher*, *Parkmerced*, and *Dean Witter*.<sup>233</sup> When representative actions are appropriately maintained, courts are free to order: (1) disgorgement; (2) restitution to those entitled, paid either directly by the defendant or through a procedure administered by the court; (3) payment by the defendant of the cost of restoring overcharges to consumers; and (4) payment of unclaimed funds into a consumer trust fund.

### III. Advantages of Representative Actions over Class Actions

The procedural flexibility of a representative action provides great advantages compared to a class action. The most significant of these advantages are (1) broad standing for any person to challenge unlawful, unfair, or fraudulent business activity; (2) an absence of expensive notice requirements; (3) an absence of certification hearing procedures; and (4) flexibility of restitution orders.

#### A. Standing Requirements

A significant advantage of representative actions over class actions is that B&P section 17203 confers standing in the broadest possible terms on "any person." Under "any person" standing, an individual or an organization may sue as a private attorney general without showing individual injury suffered because of the alleged sec-

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233. See *supra* text accompanying notes 88-92, 178-181, and 206.

tion 17200 violations.<sup>234</sup> A representative action may be used when any potential plaintiff is not a member of the affected group but wishes to sue to protect the public. As discussed earlier in this Article, however, this broad standing concept is not applicable in federal court under diversity jurisdiction.<sup>235</sup> The practical effect of this requirement is that when a noninjured party sues as a private attorney general, the plaintiff cannot bring the claim in federal court, and, perhaps more importantly, the defendant cannot remove the case to federal court.<sup>236</sup>

The broad standing provisions also avoid any question about the propriety of a named plaintiff who also serves as counsel. California courts, unlike federal courts, do not question the propriety of an attorney for the class also being a class representative.<sup>237</sup> With respect to the role of counsel as a plaintiff, the language of B&P section 17200 makes it clear that anyone is free to file an action to prevent unfair or illegal business practices. As long as the court believes that the plaintiff/counsel is prosecuting the action "in the interest of the general public," as required by B&P section 17200, the plaintiff's dual status poses no problem.

## B. Pretrial Notice and Certification

The crucial purpose of a representative action is to have the laws of the state enforced rather than to resolve individual claims. The rendering of a precise amount of compensation to each affected person is not crucial for such a suit. Instead, the underlying purpose is to stop the unlawful practice and to deter future illegalities by forced disgorgement of defendant's illegal gains. Because the primary purposes

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234. *Christensen v. Superior Court*, 271 Cal. Rptr. 360 (Ct. App.), *vacated*, 798 P.2d 1213 (Cal. 1990); *Midpeninsula Citizens for Fair Hous. v. Westwood Investors*, 271 Cal. Rptr. 99 (Ct. App. 1990); *Consumers Union v. Fisher Dev. Inc.*, 257 Cal. Rptr. 151 (Ct. App. 1989). *See Christensen v. Superior Court*, 820 P.2d 181 (Cal. 1991) (not addressing holding of court of appeal on this issue). *But cf. Santa Monica Rent Control Bd. v. Bluvshstein*, 281 Cal. Rptr. 298 (Ct. App. 1991) (holding that a government agency other than those enumerated in § 17204 does not have standing to sue under § 17200).

235. *See supra* notes 96-98 and accompanying text.

236. *E.g., As You Sow v. Sherwin Williams Co.*, No. C-93-3577-VRW, 1993 WL 560086 (N.D. Cal. Dec. 21, 1993). *As You Sow* (AYS), a nonprofit environmental and consumer protection organization, sought injunctive relief against a number of manufacturers, distributors, and retailers of building products containing the toxin toluene under California Health & Safety Code § 25249.6 and B&P § 17200. Defendants removed the action to federal court based on diversity jurisdiction. The federal court remanded the case because AYS lacked standing. As discussed earlier, the same result would follow if the § 17200 claim was asserted under supplemental jurisdiction. *See supra* text accompanying notes 96-98.

237. *See supra* text accompanying note 29.

are injunctive relief and deterrence, the procedural requirements for class certification and notice do not apply.

There is no indication in any of the reported decisions considering B&P section 17200 that due process requires any form of group "certification," and it is hard to imagine that California courts are likely to impose such a rule.<sup>238</sup> Under the terms of the section, private standing is limited to persons "acting for the interest of itself, its members, or the general public."<sup>239</sup> The determination of when an action is brought in the interest of the general public has not been discussed in the reported cases. The interests of nonparties who are within the group affected by the alleged violation of section 17200 are protected by the power of the trial court. If the court believes that a representative action plaintiff or plaintiff's counsel is abusing the procedure, it can hold that the interest of the public is not being represented and dismiss the suit or seek to have law enforcement officers intervene as additional plaintiff and counsel.<sup>240</sup>

In a representative action, the court can proceed to hear the matter on the merits with speed and economy not possible in class action litigation. This fact places the focus in representative actions on the enforcement of the rights or duties which defendant's unlawful conduct has allegedly abridged.

The absence of a class certification requirement before a hearing on the merits can be a substantial advantage to groups of consumers.<sup>241</sup> Expensive and lengthy preliminary notice procedures are not required in representative actions. The trial court is free to hold a summary judgment hearing on the merits, as in *Avco*,<sup>242</sup> at an early stage and before the consumer plaintiffs have been exhausted financially by certification, notice, and hearing procedures.

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238. In a number of cases, arguments were made that § 17200 or its predecessor section, Civil Code § 3369, was constitutionally defective, but these arguments have always been rejected. *See, e.g., People ex rel. Mosk v. National Research Co.*, 20 Cal. Rptr. 516, 521 (Ct. App. 1962). The Unfair Business Practices Act, unlike the class action statutes, contains no requirement that members of the public affected by the suit consent to the action. *See supra* text accompanying notes 86-87.

239. *See* CAL. BUS. & PROF. CODE § 17204. (West 1964 & Supp. 1994)

240. *E.g., in the Avco case*, discussed *infra* notes 260-270, the California Department of Consumer Affairs accepted the court's invitation, conveyed through plaintiff's counsel, to intervene in the suit and thereby to make the decision in the case, as a practical matter, res judicata in any subsequent litigation.

241. *See, e.g., Caro v. Proctor & Gamble Co.*, 22 Cal. Rptr. 2d 419 (Ct. App. 1993) (denying certification to a class of consumers because of several representative and individual proof problems).

242. *See infra* text accompanying notes 259-269.

The fact that the court in a B&P section 17200 action can proceed without a preliminary class certification should ease the potential for conflicts of interest between the plaintiff's attorney and the group. The difficult questions concerning a class action attorney's ability to communicate with potential class members before certification of a class are avoided in representative actions. Because there is no need for certification in a section 17200 action, there should be no concern with communications between potential witnesses in the group and either the attorney for the group or the individual plaintiff who filed the section 17200 action.

### C. Proof Required for Restitution

The public policy reason for monetary restitution authorized by B&P sections 17200 and 17500 is to punish and deter.<sup>243</sup> "To permit the [retention of even] a portion of the illicit profits, would impair the full impact of the deterrent force that is essential if adequate enforcement [of the law] is to be achieved."<sup>244</sup> A court can disgorge any property acquired as a result of an unfair business practice.<sup>245</sup> A disgorgement award "reaffirm[s] a policy of refusing to permit a defendant to retain any profits resulting from an unfair business practice . . . ."<sup>246</sup>

A recent court of appeal opinion demonstrated the advantages of representative actions that have been discussed.<sup>247</sup> In *People v. Thomas Shelton Powers, M.D., Inc.*, the court held that restitution and disgorgement of the illicit gains were appropriate remedies under B&P section 17203.<sup>248</sup> The court also held that the statute's definition of "person" was sufficiently broad to include a group of unidentified natural persons.<sup>249</sup> Therefore, there was no need to identify specific harmed individuals in order to require defendants to disgorge illegally gotten gains, and the court authorized the use of fluid recovery to fit the situation.<sup>250</sup> Thus, if the total amounts wrongfully obtained by the defendant can be determined, a fluid recovery can be ordered upon

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243. *Fletcher v. Security Pac. Nat'l Bank*, 591 P.2d 51, 57 (Cal. 1979).

244. *Id.* (quoting *S.E.C. v. Golconda Mining Co.*, 327 F. Supp 257, 259-60 (S.D.N.Y. 1971)).

245. *People v. Thomas Shelton Powers, M.D., Inc.*, 3 Cal. Rptr. 2d 34, 41 (Ct. App. 1992).

246. *People v. Powers*, 263 Cal. Rptr. 579, 585 (Ct. App. 1989), *superceded by* 786 P.2d 892 (Cal. 1990), *modified by* 3 Cal. Rptr. 2d 34 (Ct. App. 1992).

247. *See supra* text accompanying notes 234-246.

248. 3 Cal. Rptr. 2d 34, 41 (Ct. App. 1992).

249. *Id.*

250. *Id.* at 42.

proof of the unfair trade practice. Restitution to individuals would then only require direct refunds by the defendant or, if the defendants' records are incomplete, individualized proof of the claim. Consumers would not have to prove lack of knowledge of the unfair practice to obtain refunds, only that they were subjected to the practice.

#### IV. Examples of Representative Actions

In order to illustrate the use of representative actions, two trial court cases are described below. The discussion of trial court cases is necessary because no appellate court opinions have traced the procedures used in representative actions with the detail necessary to fully inform the practicing bar. The first case, *People v. ITT Consumer Financial Corp.*, was a public law enforcement action and involved a modified type of fluid recovery award in the sense that the amount paid to certain consumer trust funds was fixed in the judgment. The lawyers for both parties agreed to that amount in settlement discussions, and their settlement agreement became a stipulated judgment. The second case, *Vasquez v. Avco Financial Services*, is an example of the type of private consumer protection litigation that the authors believe is needed to enforce consumer protection statutes.<sup>251</sup>

##### A. *People v. ITT Consumer Financial Corp.*<sup>252</sup>

In this case, the Alameda County District Attorney and the California Attorney General sued ITT Consumer Financial Corp., Aetna Finance Company, and certain affiliated insurance companies under B&P sections 17200 and 17500.<sup>253</sup> The complaint alleged certain statutory violations in the making of consumer finance loans, and in the coerced sale of credit insurance, property insurance, and other ancillary purchases. The case settled with the entry of a 78-page stipulated judgment.

The stipulated judgment in *ITT* enjoined the affiliated companies, herein referred to as "ITT," from engaging in a variety of specified practices. These include: (1) requiring security in connection with a loan advertised through a firm offer and (2) selling ancillary products

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251. Copies of the cited portions of both judgments are on file with the *Hastings Law Journal*.

252. No. 656038-0 (Alameda County Super. Ct. filed Sept. 21, 1989).

253. Alleging separate causes of action for violations of both B&P sections is unnecessary because a violation of B&P § 17500 is automatically a violation of B&P § 17200. See *supra* text accompanying note 77.



without the use of certain statutorily required disclosure forms plus a good faith attempt to determine whether the customer wants the ancillary items. The ancillary items included credit life and disability insurance, household contents insurance, auto collision and comprehensive insurance, and buyers club or "thrift club" memberships.

Under the injunction, in future sales of these ancillary items, ITT is required to disclose the amount of the monthly payment without the ancillary items and the amount of increase for each ancillary item. The injunction also requires disclosures about the increased costs of consolidating or refinancing loans.

The judgment provides both for direct restitution and for fluid recovery. Persons who secured a loan from ITT from January 1, 1985 to October 21, 1989 and who purchased any ancillary products during the period are eligible for restitution of up to the full amount paid for these items plus finance charges attributable to them.<sup>254</sup> Provisions of the judgment deny eligibility for restitution to certain types of purchasers, such as those who have had their debts to ITT discharged in bankruptcy. Other provisions limit the amount of restitution for borrowers who have fallen delinquent on their loans from ITT.

To see that purchasers receive notice of their right to receive restitution, the stipulated judgment calls for a series of mailings by ITT to customers who bought ancillary products in this time period. It sorts customers into groups depending on whether the mail is deliverable to them, whether they respond to it, and what their responses are. The mailing includes a questionnaire that asks a variety of questions designed to determine if the borrowers knew they were buying insurance and other ancillary products and if the borrowers wanted or needed them. Only persons who receive and return the questionnaire may share in the direct restitution.<sup>255</sup>

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254. The criteria for who receives restitution and in what amounts are set forth in a separate memorandum of understanding that the parties agreed would be kept secret until the end of the restitution program. It appears, however, from reading various terms of the stipulated judgment, the most that could be received is the total paid for all insurance premiums and thrift club memberships, plus the percentage of the total loan interest allocable to these products.

255. The wisdom of a complex claims procedure such as the one provided for in *ITT* is beyond the scope of this Article. However, there is reason to question the effectiveness of claims procedures standing alone, to effectuate restitution. See Hillebrand & Torrence, *supra* note 55 (suggesting that low claims rates make claims procedures inappropriate unless the settlement and judgment also include a *cy pres* use of funds not claimed). Perhaps to address this issue, the *ITT* judgment also includes a separate restitution award of \$10 million for a *cy pres* fund.

The judgment also requires payment of \$10 million in indirect restitution to fund a consumer protection trust fund.<sup>256</sup> This is a type of unclaimed award disposition to further the purposes of the original suit—consumer protection—in a manner likely to assist or protect the same persons who were harmed by the practices at issue. Persons who suffered from the practices alleged in the suit, who do not benefit from direct restitution, may nonetheless benefit indirectly by the increased consumer protection law enforcement efforts that will be funded. The trust fund was created by a provision in the judgment requiring ITT to pay \$10,000,000 to be used by the Attorney General, district attorneys, and city attorneys for the investigation, prosecution, and enforcement of consumer protection actions.<sup>257</sup> Under the terms of the judgment, grants from the fund may also be used to support certain out of pocket costs for significant consumer protection cases brought by Legal Aid. The judgment provides that only interest from the fund may be expended, the corpus of the fund is a permanent endowment to be administered by five individual trustees selected by law enforcement agencies.<sup>258</sup>

#### B. *Vasquez v. Avco Financial Services*<sup>259</sup>

The plaintiff in *Vasquez v. Avco Financial Services* had purchased consumer goods and insurance to protect her against theft. After her goods were stolen and Avco denied her insurance claim, she ceased making payments. An Avco branch manager originally brought suit against Vasquez in small claims court for nonpayment of the debt. Vasquez cross-complained with a representative action in which she alleged that Avco had engaged in the practice of “flipping,” i.e., the conversion by a holder of a retail installment sales account into what was termed a new loan.

By the challenged practice, Avco was able to collect greater interest on the new loans than was legally possible to collect on the retail

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256. The judgment also creates a separate \$500,000 trust fund for use by the Alameda County District Attorney. The judgment also calls for \$8,675,000 in civil penalties.

257. The provision reads as follows:

Aetna shall pay plaintiff, as restitution under the doctrine of *cy pres* pursuant to B&P § 17203 and 17535 and the guidelines of Levi Strauss . . . the sum of ten million dollars (\$10,000,000).

258. To address the basic problem with earmarked escheat, the judgment also provides that funds may not be received unless the applying agency certifies that regular funding will not be reduced because of approval of the request for funds. The earmarked escheat problem is discussed *supra* text accompanying notes 60-61.

259. *Vasquez v. Avco Fin. Servs.*, No. NCC-11933-B (L.A. Super. Ct. Apr. 24, 1984).

installment contracts.<sup>260</sup> Vasquez sought to enjoin the practice under B&P section 17200 as an unlawful business practice that violated specific provisions of the Unruh Retail Installment Sales Act.<sup>261</sup>

The practice was carried out in the following way. Customers who purchased, on credit, large-ticket consumer goods together with required credit life, credit disability, and property insurance, found their accounts had been assigned to Avco. Thereafter, Avco solicited the customers to persuade them to borrow additional funds or simply to refinance their retail installment contracts without an additional extension of credit. Guidelines for solicitation contained in an Avco manual provided that customers were repeatedly contacted by Avco personnel on the telephone and in person. Each such contact offered the customer additional funds through a variety of standardized sales pitches. Avco's reason for engaging in the practice of converting retail installment contracts into loans was frankly described in its manual—converting sales into loans maximized profits.<sup>262</sup>

Vasquez had made two separate purchases, a television set and a stereo, from Zody's Quality Discount Department Store. Each of the purchase contracts imposed an annual finance charge of approximately 18%, which was then the legal limit for retail installment sales under the Unruh Act. With each purchase, Vasquez was charged premiums for credit life, disability, and property insurance and interest thereon. Both retail installment purchase contracts were assigned by Zody's to Avco before the first payments were due.

Avco next offered to loan Vasquez money to pay off the two retail installment contracts and provide additional funds for her use. After a number of solicitations, she agreed. Avco then refinanced her two existing sales contracts, charged her for three additional policies of insurance, and disbursed to her an additional \$305. The annual finance charge imposed on the total new obligation was 24.03%. This

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260. For retail installment sales, the Unruh Act at the time imposed an interest rate ceiling of 18%. CAL. CIV. CODE § 1805.1 (West 1985 & Supp. 1994). Avco's position was that converting those sales into loans allowed it to impose higher interest rates of 24-29% under the Personal Property Brokers Law. CAL. FIN. CODE §§ 22480-81 (West 1985 & Supp. 1994).

261. CAL. CIV. CODE § 1801 (West 1985 & Supp. 1994).

262. Two of the authors recall one instance testified to at the trial in which an Avco representative visited a customer at home while she was recuperating from cancer surgery. After several hours, the customer agreed to what Avco called a "new loan." Avco paid off her existing sales account, purchased three new insurance policies for her, and disbursed to her a total of \$2.37. Avco established a new schedule of payments on the "new loan" obligation, increasing the annual interest from the 18% then allowable under the Unruh Act to a rate in excess of 29%.

rate was legal if the Personal Property Brokers Law governed, but greatly exceeded the Unruh Act rate. Avco's position was that because the new transaction was a loan rather than a financed installment sale, the Unruh Act was inapplicable. The terms of the new loan agreement purported to eliminate all of the protections given purchasers in the Unruh Act.<sup>263</sup> That statute also regulates refinancing of a contract for the sale of goods by a holder, and it specifies the necessary disclosures for any refinancing agreement.<sup>264</sup> Vasquez alleged that many of the provisions of the Unruh Act had been violated by Avco in its dealings with her and other consumers.

The suit was litigated on behalf of all Avco customers whose sales accounts had been flipped, a group of more than 125,000 persons

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263. The Unruh Act, which specifically defines and regulates the refinancing of retail installment contracts provided, at the time, *inter alia*, that: (1) interest rates not exceed 18%, (2) holders may not take a security interest in a person's household goods, and (3) deficiency judgments are prohibited. See CAL. CIV. CODE §§ 1801-1812.649. As alleged in the complaint in the action, Avco, under the new agreement, acquired a security interest in Vasquez's "household goods, furniture, appliances and consumer goods of every kind and description now owned and located about the premises." Additionally, the agreement allowed Avco to repossess all of the security up to a total amount of the new combined obligation, \$1,096.72, sell it, and obtain a deficiency judgment if Vasquez missed a payment under this new obligation.

264. The Unruh Act is found at CAL. CIV. CODE § 1801-1812.649 (West 1985 & Supp. 1994). California Civil Code § 1802.6 defines "retail installment contract" as any contract for a retail sale that provides for repayment in installments wherein the buyer agrees to pay a finance charge or a higher price than is available to cash customers. The provisions of California Civil Code §§ 1801-1812.649 limit the conduct of retail sellers and their assignees. The Act specifically applies to "holders." A holder is defined as "the retail seller who acquires a retail installment contract . . . or if the contract or installment account is purchased by a financing agency or other assignee, the financing agency or other assignee." CAL. CIV. CODE § 1802.13 (West 1985).

The Unruh Act also specifically defines and regulates the refinancing of retail installment contracts. Civil Code § 1807.2 provides:

The holder of a retail installment contract or contracts may . . . refinance the remaining amount owing on the contract . . . by providing for a new schedule of installment payments. The holder may charge and contract for the payment of a refinance charge by the buyer . . . but such refinance charge shall be based upon the amount refinanced . . . that to which the buyer would have been entitled under § 1806.3. The agreement for refinancing may also provide for the payment by the buyer of the additional cost to the holder of the contract . . . of premiums for continuing in force . . . any insurance coverages provided for therein.

CAL. CIV. CODE § 1807.2 (West 1985 & Supp. 1994).

Civil Code § 1803.3 provides that: (1) the buyer is entitled to receive a refund credit of a portion of the unearned finance charge and that the amount of such refund must be disclosed in the refinancing agreement; (2) the refinancing agreement must set forth the amount of the existing outstanding balance to be refinanced; (3) the agreement must detail any additional cost of insurance; (4) the refinance charge may not exceed the annual percentage rate limits in Civil Code § 1805.1; and (5) the new agreement must set forth the amount financed.

throughout California. In the early phases of the case, the law and motion court recognized that the suit was analogous to a class action. The court, *sua sponte*, invited state agencies to intervene, in order to protect Avco from the risk of a second suit. That invitation was accepted by the Director of the Department of Consumer Affairs, who intervened in the litigation in October 1979.

After a bifurcated trial on the merits, cross-complainant and intervenor prevailed. The trial court enjoined Avco from imposing finance charges in excess of the amount allowed under the Unruh Act and from violating a number of other provisions in the Act. Avco was also enjoined from continuing to make a number of false representations regarding insurance to its customers.<sup>265</sup>

The trial court also granted restitutionary relief worth \$2.5 million to the represented group. The trial court required Avco to make restitution directly to its current customers of the amounts by which they were overcharged, plus interest, and to bear all the administrative costs incurred in refunding those monies. Nearly \$1 million was distributed directly to Avco customers by Avco personnel. Avco was also ordered to pay for monitoring of the refund process by plaintiffs' accountants, at a cost to Avco in excess of \$250,000.<sup>266</sup> Because many former Avco customers could not be located for restitution without undue expense, a stipulation was reached between counsel for a disposition of the unclaimed portion of the award that put the funds to the next best use. Under the terms of the court approved fluid recovery remedy, the undistributed residue of approximately \$1.4 million was used to establish a consumer trust fund. The monies were used by the West Coast Regional Office of Consumers Union for research, litigation, legislative advocacy, administrative advocacy, and education in the areas of consumer credit and finance.<sup>267</sup>

The consumer trust fund created by the court's order in *Avco* funded the California Credit and Finance Project of Consumers Union under the general supervision of Vasquez's counsel and the ultimate oversight of the trial court. For nearly a decade, project staff monitored consumer credit problems of low and moderate income

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265. Judgment in *Vasquez v. Avco Fin. Servs.*, No. NCC-11933-B (L.A. Super. Ct. Apr. 24, 1984).

266. *Id.*

267. Application for Approval of Amended Memorandum of Understanding with Consumers Union, No. NCC-11933-B, at 2, 4 and the Status Report Re Restitution and Operation of *Cy Pres* Remedy as of June 17, 1986 [hereinafter Status Report] in *Vasquez*. After establishment of the *cy pres* fund with the *Avco* residue, courts have approved payment of residues to the Consumers Union for the same purposes in several other cases.

consumers in California, sponsored and opposed legislation on the state level involving low and moderate income consumer credit issues, and litigated cases involving issues of concern to low and moderate income consumers in California.<sup>268</sup> The Project also maintained an advisory council of persons experienced in consumer protection law and issues to provide advice to the Project staff on consumer credit and finance problems.<sup>269</sup>

### Conclusion

Attorneys interested in consumer protection litigation should recognize that representative actions are an alternative to class actions and can be a powerful tool in efforts to redress abuse of consumers. Because representative actions are based upon an interest theory as opposed to a consent theory, such actions do not require the preliminary notice and procedural hearings involved in class actions. Representative actions therefore involve a streamlined procedure and can be handled with more speed and more economy. The power given by the statute to the trial court to order restitution is broad enough to provide for consumer redress in most instances regardless of the resolution of the question of the availability of damages in representative actions.

The fluid recovery device is well-fitted for use in both class and representative actions. It can provide significant indirect benefit to persons who cannot be located or do not file claims, and therefore do not share in refunds in class or representative action litigation on behalf of consumers.

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268. Status Report, *supra* note 267.

269. Status Report, *supra* note 267.

## Appendix

The following sections suggest principles and practical approaches that courts and counsel in representative actions should consider in the use of the fluid recovery concept. These considerations also are appropriate in class actions in which the fluid recovery concept is adopted.

### A. The Role of Counsel Proposing Fluid Recovery

Plaintiff's counsel in a representative action should recommend approval of a fluid recovery plan for distribution of the unclaimed portion of an award.<sup>270</sup> In proposing a *cy pres* fluid recovery use, counsel should propose a disposition of the unclaimed portion of the award that makes the recipient of the award accountable to the court. The means of providing for such accountability must ensure that the funds will be used either to promote the purposes of the statutory prohibitions to be enforced or to protect the interests of the persons injured by the illegal conduct.

Counsel should expect the court to carefully review the competence and record of organizations that are proposed as recipients for awards of unclaimed funds. Serious consideration should be given to using the unclaimed portion of the award for a long-term grant to an existing organization with competence in the issues raised in the representative action. This is because of the expertise developed by such an organization from addressing similar issues over a period of time.

When counsel wishes to propose that a new organization receive the unclaimed award, counsel should be prepared to show the court how that organization has the ability and competence to work for the interests the litigation was brought to protect. This can be accomplished by providing information to the court about the current or proposed officers, directors, and staff of the organization.

To further ensure accountability, counsel can negotiate a formal agreement with the proposed recipient of the funds. Under the agreement, the proposed recipient binds itself to restrictions on the use of the funds, and to comply with accounting, auditing, and reporting requirements.<sup>271</sup> Such a negotiated agreement offers assurance to the court that the proposed recipient understands the restrictions on the

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270. Model stipulations, restrictions, and agreements that can be used for the purpose of structuring and moving for an order approving a fluid recovery are on file and available to interested counsel from the West Coast Regional Office of Consumers Union located in San Francisco.

271. This procedure was used in the *Avco* litigation discussed *supra* notes 259-269.

funds and intends to comply with those restrictions if awarded the funds.

Counsel for the plaintiff can assist the court in its evaluation of a proposed disposition by describing the following procedures:

- (1) The steps taken or to see that the award has been distributed to persons abused by the conduct complained of in the representative action.
- (2) The reason why the entire award cannot reasonably be returned directly to affected persons.
- (3) The name of the proposed recipient of the unclaimed portion of the award, and the use the recipient will make of the unclaimed portion of the award.
- (4) The reason this disposition is the "next best" use of the unclaimed portion of the award, *i.e.*, how it will indirectly benefit the persons represented in the original suit.
- (5) The specific procedures that will ensure that the money will be properly used.
- (6) The mechanisms to assure recipient accountability.

## **B. The Role of the Trial Court in Ordering Fluid Recovery**

The role of the trial court is particularly important when judgment or settlement in a representative action includes a fluid recovery. The court must determine that the proposed fluid recovery will indirectly benefit the represented group.

Procedures that have been used in orders to provide for monitoring and accountability include a statement of purpose; an advisory or grant making board; submission to plaintiff's counsel of periodic plans of future work and reports on past activities on an annual, semiannual, or shorter basis as circumstances require; and a provision for continuing jurisdiction of the court.<sup>272</sup>

There is no explicit statutory requirement for court approval of *cy pres* remedies obtained by settlement of representative actions. However, it is advisable that any such settlement of a representative action be submitted to the court for approval. The court can make sure that sufficient procedures are in place to provide that those responsible will effectively implement the purpose of the award and that adequate reporting mechanisms exist to monitor the recipient's use of the awarded funds.

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272. See *Vasquez v. Avco Fin. Servs.*, No. NCC-11933-B (L.A. Super. Ct. Apr. 24, 1984) discussed *supra* notes 259-269; *In re Application of Pacific Bell*, No. 87-12-067 (Dec. 22, 1987) (Application 85-01-034; I.85-03-078, OII84; C.86-11-028); *People v. ITT Consumer Fin. Corp.* discussed *supra* notes 252-258, Hillebrand and Torrence, *supra* note 55.



